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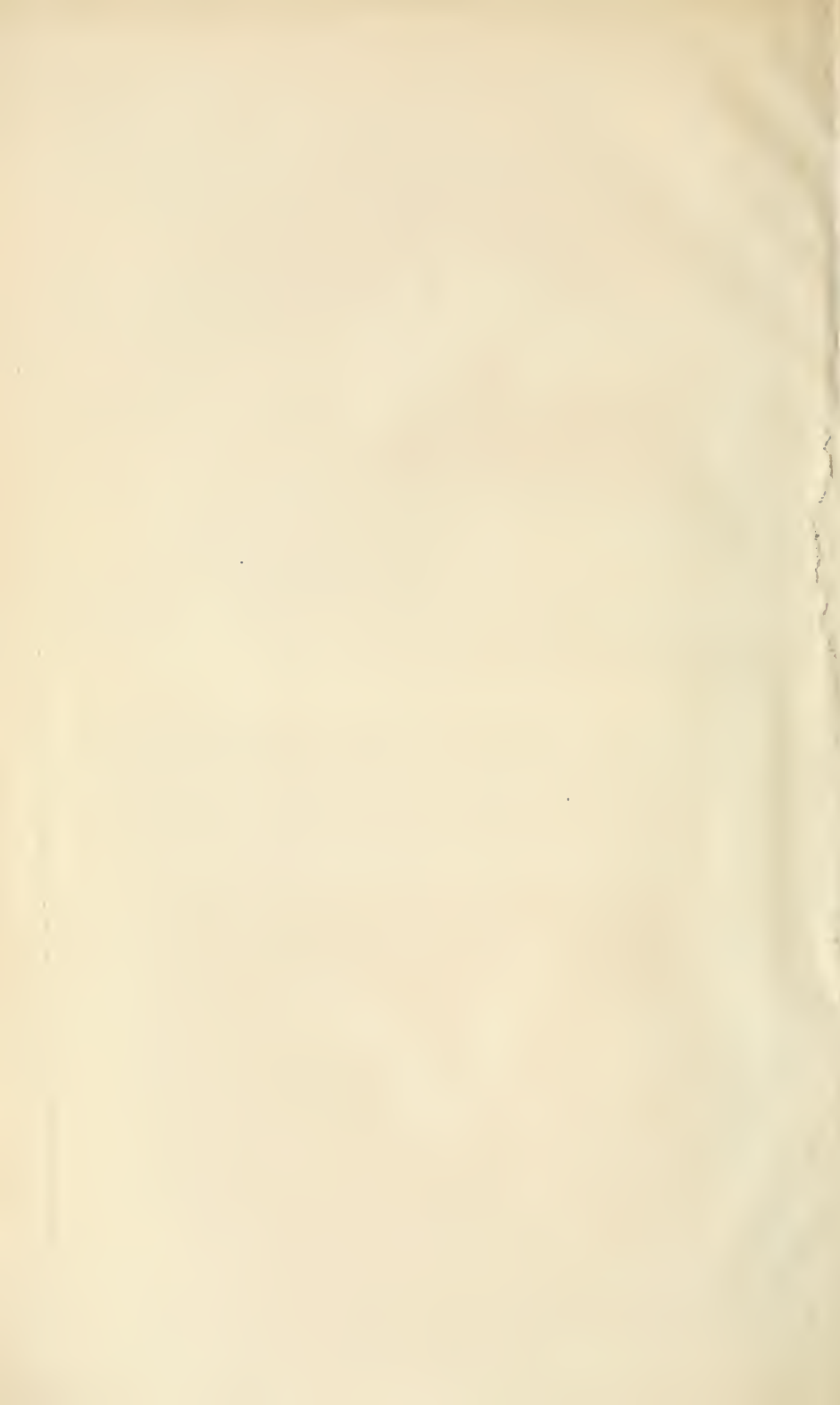
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THE LAW
OF
PRINCIPAL AND AGENT.

THE LAW
OF
PRINCIPAL AND AGENT

BY

ERIC BLACKWOOD WRIGHT,

B.A., LL.B.,

*Late Holder of Three Scholarships at the Middle Temple, and Prizeman of the Council of
Legal Education;*

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PREFACE.

THE present Work was undertaken in the hope, not of supplanting either of the two standard works on Principal and Agent—those of Mr. Justice Story and Mr. Evans—but of supplying a handy text-book on the subject, for which there seemed to be a need, since “Principal and Agent” has been made one of the subjects for the Final Examination for Call to the Bar.

The appearance of another Work on Principal and Agent is also perhaps justified by the fact that the last book on the subject was issued in 1888, and since then considerable changes have taken place in the law. First, the Factors Act of 1889 has been passed, consolidating the law with respect to mercantile agents, and affording greater protection to persons dealing with those who are in possession of goods as apparent owners. Next, the Gaming Act of 1892 has made a principal no longer liable to indemnify his agent in respect of gambling debts, overruling *Read v. Anderson*; and the Married Women’s Property Act of 1893 has altered the position of a married woman as principal in respect to contracts. Lastly, many points obscure in 1888 have been by subsequent decisions elucidated; so that the Law of Agency has become altogether more simple and harmonious.

C. C. C. 6/1/12

Having been a "Times" Law Reporter, I have naturally striven to call the attention of the profession to the large number of cases reported in these Reports, of which text writers seem to have but little availed themselves hitherto. Some important decisions as to when commission is payable to Commission Agents and House Agents appear only to be reported in these Volumes.

The Appendix contains the most recent statutes affecting the law on the subject, viz., the Factors Act, 1889, the Gaming Act, 1892, the Married Women's Property Act, 1893.

The Sale of Goods Act, 1893, has also been inserted in the Appendix, as it codifies the law as to Stoppage in Transitu. The Index has been made an index to all the Acts included in the Appendix as well as the body of the book, in the hope that this may assist the reader in studying any change that may be made by recent legislation.

For convenience of practitioners, a reference has been given in the Table of Cases to all the Reports of each case, and the date of each case is given in the text.

In conclusion, the Author has to express his deep obligations to Mr. JOHN WILLIAM GORDON for many valuable suggestions and much assistance in revising the proofs.

E. BLACKWOOD WRIGHT.

April, 1894.

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ADDENDUM.



Possession by Mercantile Agent.

In order that the disposition by the mercantile agent of goods, or a document of title thereto, should give a good title to them to the third party, or give him any rights over it, the agent must be in possession of them with the consent of the owner. If he has got possession under circumstances which amount to larceny by a trick, possession has never passed. Thus, in the *Queen v. Buckmaster*, where a welsher on a racecourse obtained money to lay on a race, never intending to repay it in any event, it was held there was no contract under which the property in the goods could have passed, and that he was guilty of larceny (*a*). Where goods have been obtained by fraud, or other wrongful means not amounting to larceny, the property in such goods passes by the disposition of the mercantile agent, and the third party is protected.

In *Colquhoun v. Wetzell*, reported in the *Times* of the 4th, 7th, and 10th of Feb. 1894, a mercantile agent obtained possession of a picture by Constable on the representation that he had a purchaser of it for 1,000*l*. In fact he had no purchaser at all. After getting the picture, he pledged it to Wetzell for 300*l*. In an action for conversion against Wetzell, Mr. Justice Hawkins asked the jury whether the agent got possession intending to commit a larceny, or whether he only afterwards conceived the fraudulent intention of pawning it. The jury finding that possession of the picture was obtained for the purpose of committing a fraud, his lordship gave judgment for the plaintiff (*b*).

(*a*) *Queen v. Buckmaster* (1887), 20 Q. B. D. 182; 57 L. J. M. C. 22; 57 L. T. 716; 36 W. R. 160; 52 J. P. 120; 16 Cox, C. C. 339.

(*b*) See also *Kingsford v. Merry* (1856), 1 H. & N. 503; *Fickers v. Hotz* (1871), L. R. 2 H. L. Sc. 113; *Baines v. Swainson* (1863), 4 B. & S. 270; 30 L. J. Q. B. 281.

Usage—Scale of Charges of the Institute of British Architects.

As has been pointed out by Mr. Hudson in his work on Building, at p. 79, the charges of the Institute of British Architects are only those of a trade union, and neither bind the Court nor those employing architects. The Lord Chief Justice of England, Lord Coleridge, in *Burr v. Ridout* (c), thus commented on the scale: "It was said that the Institute of Architects had settled certain charges, and percentages were charged on the estimated amount of expenditure. But a commission upon expenditure incurred was open to the gravest possible objection. A gentleman wished to build a house and was willing to pay 50,000*l.* upon it, and asked an architect to prepare plans for such an expenditure. His architect prepared plans for a house which would cost 150,000*l.* and said: 'Well, you may or may not build it, but you must pay me whether you do so or not commission upon 150,000*l.*, for the Institute of British Architects say so.' He confessed his legal soul fired at it, and he hoped no British jury would ever yield to it, for it was a most unjustifiable attempt of a body of men for their own advantage, and to increase their emolument." In *Eddy v. McGowan*, Times Newspaper, 17 Nov. 1870, both the Chief Baron (Sir Fitzroy Kelly) and Baron Bramwell refused to recognise the same scale. For other building customs which have been held bad, see Lord Grimthorpe's (Sir Edmund Beckett) book on Building, 2nd ed. Chap. I.

Liability of Intermediate Agent.

Story says that the general rule is, that sub-agents have exactly the same rights against their intermediate employers as if the intermediate agents were the sole and real principals (d).

Where the intermediate agent does not disclose his principal, that must be so; for then the sub-agent only relies on the credit of the agent. The principal will also be liable, it is submitted (unless the sub-agent has given exclusive credit to the agent), on the principle laid down in *Armstrong v. Stokes* (e). Where the agent has no right to delegate, or where he is a factor, there, it seems, from general principles, the agent must be solely liable. In some cases, where the principal is disclosed, the liability of the

(c) Times, 22 Feb. 1893.

(d) Sect. 386.

(e) (1872), 7 Q. B. 598.

agent must depend on the intention of the parties as interpreted by the usage and custom in the particular business. The agent in some cases is only the instrument by means of which the principal employs the sub-agent; in others, as in the case of the London agent of a solicitor, the solicitor, and not the client, is primarily responsible.

Broker—Authority to Vary Contract.

A broker with an undisclosed principal may vary the terms of payment after the sale is completed. The principal may interfere at any time before payment, but not to rescind what has been done before. If a man sells goods acting as broker, the moment the sale is completed he is *functus officio*. The terms of the contract cannot then be altered, except by the authority of the principal (e).

(e) *Blackburn v. Scholes* (1810), 2 Camp. 341.

PRINCIPAL AND AGENT.

CHAPTER I.

INTRODUCTORY.

THE Law of Principal and Agent, the mutual rights and duties of the principal and agent towards each other, and the position of third parties towards them, are of ever-increasing importance; as in our modern civilization comparatively little business is done between the two principals themselves.

Story defines a principal as a person who, being competent and *sui juris* to do an act for his own benefit, employs another person to do it. The person who is thus employed, and brings the principal in legal relations to a third person, is an agent. The relation between the two parties, viz., the principal and the agent, is termed agency. The power thus delegated is called in law the authority (*a*).

Definition of terms
"principal,"
"agent,"
"authority."

It is not easy at first sight to say who is and who is not an agent, though there is little difficulty in saying who is a principal. In Smith's Mercantile Law an agent is defined as "a person authorized to do some act or acts in the name of another." The expression "in the name of another" seems also to imply that whatever an agent does he does in a representative capacity for someone else. A large class of agents, however, such as factors, notoriously never act in the name of their principals, but always in their own names, though on behalf of others. This

Other definitions of
"agent."

(*a*) Story on Agency, sect. 3.

Suggested
definition.

definition seems therefore to be unsatisfactory. If, on the other hand, we define an agent to be "a person authorized to do some act or acts for another," then we include servants, who, though they may be agents for the purpose of making the owner of property liable for tort, are not usually employed as agents in the sense that the word is used in works on the law of Principal and Agent. The word agent is used, in works on the law of Principal and Agent, only of a person employed for the purpose of bringing the principal in legal relation with a third party; whether that agency be an abiding condition or a temporary one depends on what the business of the person is. Some persons' occupation (as that of a solicitor, factor, broker, or house agent) consists in bringing about such legal relationship; with others their agency is of a more fugitive character.

The principal may employ a servant as an agent, but an agent is not necessarily a servant. A person is in the position of a servant when he does work on the terms that not only the object or end of his work is prescribed for him, but he is also either directed, or is liable to be directed, as to the means or method of doing it, *i.e.*, when his employer retains the power of controlling the work (*b*). When a person is employed to bring his employer in legal relations with a third person, he is an agent. If he is not under the control, as above described, he is not a servant but an agent only.

As an agent is a person employed to bring the principal in legal relations with a third party, it is absolutely necessary, in order to carry out the contract of employment between the agent and his principal, that there should be a third party with whom the principal is to be brought into relation (*c*). The contract between the principal and

(*b*) See Pollock on Torts, 3rd ed.
p. 72.

(*c*) See *Robinson v. Mollett* (1874),
7 E. & I. Ap. 802; and see Brett, J.,
at p. 820.

agent is primarily a contract of employment, and a person selling his own property or goods cannot be an agent; or, if he is one, he is thereby violating the contract with the principal and himself, and attempting to substitute a different relationship between them, viz., that of vendor and purchaser. An agent is appointed to make the best bargain for his employer, and to protect his interests in relation to the subject-matter of the agency. He is chosen usually on account of the high opinion his employer has of his trustworthiness and discretion; and for this reason he is allowed to have no interest in the subject-matter unknown to his employer, lest his judgment should thereby be affected (*d*). When it is once realized clearly what the nature of the relationship between the principal and agent is, viz., employment for the purposes of bringing the former in legal relationship with a third party and creating privity of contract between such third party and the principal, it is obvious that it is improper for the agent to sell his own goods to the principal, to have any interest in the subject-matter of the agency adverse to the principal, or to receive any remuneration from the third party. The neglect of the maxim "That no man can serve two masters," has led to most of the frauds of agents, who either seek to palm off their own goods on the principal while at the same time charging him a commission for procuring the goods at the lowest price on the market, as if there were a third party, *ex. gr.*, the agent in *Robinson v. Mollett*, or else they try to get a commission from both the principal and third party, as in *The Panama and South Pacific Telegraph Co. v. The India Rubber Works Co.*, and so render themselves unable to exercise an unbiassed judgment for their employer.

In commercial matters, where the real relationship is that of vendor and purchaser, persons are sometimes

Relation of
vendor and
purchaser dis-

(*d*) *Panama and South Pacific Tel. Co. v. India Rubber Co.* (1875), 10 Ch. 515.

tinguished
from that of
principal and
agent.

called agents when, as a matter of fact, their relations are not those of principal and agent at all, but those of vendor and purchaser. If the person called an "agent" is entitled to alter the goods, manipulate them, to sell them at any price that he thinks fit after they have been so manipulated, and is still only liable to pay for them at a price fixed beforehand, without any reference to the price at which he sold them, it is impossible to say that the relation of principal and agent exists (*e*). A purchaser has not to account to his vendor; his only duty is to pay him; and all the other rights and duties which exist between principal and agent do not exist between vendor and purchaser (*f*).

In practice it is not always easy to distinguish the position of the parties, and to know whether the parties were vendor and purchaser or principal and agent. If the relation between the parties is that of vendor and purchaser, each party takes upon himself the risk of the fall and rise in price of the article bargained for, and they are at arms' length. The seller binds himself to supply the goods. In the other case, if the parties are principal and agent, then the agent only undertakes, when he accepts the duty, to use due diligence in trying to fulfil the order, and for his trouble is paid by way of commission on the work done. He does not take upon himself any part of the risk or profit which may arise from the fall in prices (*g*).

In this work prominence is given principally to the two great classes of mercantile agents—Factors, who are in possession of goods for their principals, and who sell or buy in their own names; and Brokers, who only negotiate the sale or purchase, without being in possession. The most

Different
kinds of
agent.

(*e*) *Ex parte White, In re Nevill* (1871), 6 Ch. 397, at p. 400.

(*f*) *Ex parte Bright, In re Smith* (1879), 10 Ch. Div. 566; *Ex parte*

White, In re Nevill (1871), 6 Ch. 397.

(*g*) *Ireland v. Livingstone* (1871), 5 E. & I. Ap. 395, at pp. 407, 408.

important kinds of agents after the above are—masters of ships, who, to a certain extent, occupy the position of principal and agent rolled into one; stockbrokers, whose dealings are confined to one particular class of commercial security, shares and stocks; house agents, whose importance has been growing, on account of the very much larger amount of business done by them; and commission agents generally.

The law of principal and agent is only a branch of the law of contract; but in so far as it deals with the reciprocal rights and duties of persons who are in a confidential position towards one another, it is considerably affected by doctrines similar to the equitable principles affecting trusts and trustees. The subject naturally falls under two heads: first, the contract between the principal and the agent, whereby the agency arises, and next the contract made by the agent by virtue of the contract of agency. Under the first head, we will consider the appointment of the agent, the rights and duties of the principal and agent to one another, and the termination of the agency; under the second, the rights of the principal and his agent against the third party, and such third party's rights against the principal and agent respectively.

Law of principal and agent, branch of law of contract.

Falls naturally into two contracts: between principal and agent, and between principal and third party.

Whenever a person does an action in his own right he can delegate its performance to an agent, except in a few cases which are of a personal nature, such as homage, or the exercise of a bare power (*h*). If a public duty or trust is imposed on anyone, he cannot delegate this power, but must perform it himself. So a railway company which, practically under the guise of giving running powers, transferred its line to another company, was held incapable of doing so, and the Court refused to enforce the agreement. V.-C. Turner, in such a case (*i*), said: "In form

What can be delegated to an agent.

(*h*) 9 Coke, 76a.

(*i*) *G. N. Ry. Co. v. The Eastern Counties Ry.* (1851), 21 L. J. Ch.

837; and see *Gardner v. L. C. & D. Ry.* (1867), 2 Ch. 201.

it is declared that the instrument shall not operate as a lease or an agreement ; it amounts in substance either to one or the other. It is framed in total disregard of the obligations and duties which attach to these companies, and is an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament in the exercise of its discretion with reference to the interests of the public. . . . I think it is the duty of this Court to withhold its interference when called upon to aid agreements of such a nature.”

What cannot
be delegated
to an agent.

Where a man has no authority himself to do a thing, he can of course not give another authority to act. It is well settled that a corporation established for a specific purpose cannot bind itself by a contract entirely unconnected with the purpose of its incorporation ; for example, a railway company cannot accept bills (*k*). This principle was approved of by Lord Cairns, and adopted as to companies (*l*). In order to ascertain what sort of agents a company can appoint, one must look to the memorandum of association. The persons who can exercise the powers are those fixed by the articles of association. As no man has a right to commit a crime, a wrongdoer cannot set up as a defence that he acted merely as the agent of someone else : each wrongdoer being personally liable (*m*).

As to the liability to compensate or indemnify an agent who commits a tort in pursuance of a command of his principal, and thinking he has a right to do the act, and it being apparently lawful, see “Liability of Agent to Third Party.”

(*k*) See Erle’s, C. J., judgment in *Bateman v. Mid-Wales Ry. Co.* (1866), L. R. 1 C. P. 499.

(*l*) *Peruvian Ry. Co. v. Thames*

and *Mersey Marine Insurance Co.*, (1867), 2 Ch. 617.

(*m*) *Hugh v. Abergavenny* (1875), 23 W. R. 40.

CHAPTER II.

WHO MAY BE PRINCIPAL AND WHO AGENT.

ANY person who is *sui juris* is capable of becoming a principal and an agent. Infants, married women, idiots, lunatics, and other persons not being *sui juris* are either wholly or partially incapable of being principals. As a principal appoints or employs someone to act for him, he must be capable of acting himself, and be capable of entering into a contract.

Who may be a principal.

Infants are, by the Infants' Relief Act, 1874 (*a*), incapable of entering into contracts for the repayment of money lent or for goods supplied, unless they are necessities, and all accounts stated with them are void. They are incapable of appointing an agent (*b*). In *Maldon v. White*, Mr. Justice Buller is reported to have said that Lord Mansfield had laid it down as a general principle that if an agreement were for the benefit of an infant at the time it would bind him. Sir George Jessel (*c*) doubted the accuracy of the report, and Mr. Simpson, in his book on Infants, suggests that the meaning of the supposed rule is not that an infant can bind himself by a beneficial contract, as he can for necessities, but that if it becomes necessary to decide the question, the Court may decree such an agreement to be binding (*d*).

Infant cannot be principal.

Infants are, therefore, generally incapable of being principals, their contracts being voidable at their option,

(*a*) 37 & 38 Vict. c. 62.

(*b*) *Doe d. Thomas v. Roberts* (1847), 16 M. & W. 778.

(*c*) *Martin v. Gale* (1876), 4 C. D. 431.

(*d*) Simpson on Infants, 2nd ed., p. 100.

except contracts for necessities. An infant can, however, employ servants suitable to his station and condition in society (*e*); but he would probably not be held liable in tort as principal for their negligence or carelessness while in his employment (*f*). He would, however, be liable for a tort committed by an agent in his presence, and by his order (*g*), for that would be his direct act. It has, however, been held that though on the principle *qui facit per alium, facit per se* the master is liable for the negligent acts of his servants (*h*), yet that the liability does not make the direct act of the servant the direct act of the master.

An infant may carry on a trade, but a man dealing with him trusts to his honour, and to the fact that it is to his advantage when carrying on a trade to pay (*i*).

Lunatics
incapable
of being
principals.

Lunatics are incapable of being principals; though in one case, where a person had contracted with a lunatic in ignorance of his state of mind, and the contract was fair, the Courts refused to upset it or declare it void, as it was no longer executory, but executed, and the parties could not be placed in the same position (*k*). If a person were to act as agent for a lunatic after he knew of his lunacy and his incompetency to act, he would be liable to be sued for a breach of warranty of authority by anyone who had been misled thereby (*l*). As to the effect of the principal's becoming a lunatic during the agency, see chapter on the "Termination of the Agency."

A lunatic or his estate may be liable *quasi ex contractu* for necessities supplied to him in good faith, and this applies to all expenses necessarily incurred for the protection of his person or estate, such as the costs of lunacy

(*e*) *Chapple v. Cooper* (1844), 13 M. & W. 252.

(*f*) *Roberts and Wallace on The Duty and Liability of Employers*, 3rd ed. p. 50.

(*g*) *Burnard v. Haggis* (1863), 14 C. B. N. S. 45.

(*h*) *Sharrod v. L. & N. W. Ry.*

(1849), 4 Ex. 580.

(*i*) *Ex parte Jones, In re Jones* (1887), 18 C. D. 109.

(*k*) *Moulton v. Camroux* (1849), 4 Ex. 17; *Beaven v. McDonnell* (1853), 9 Ex. 309.

(*l*) *Drew v. Nunn* (1879), 4 Q. B. D. 661.

proceedings (*m*). If a person of sound mind, who is a principal, becomes a lunatic, the agency determines, except as to persons who have dealt in good faith in ignorance of the insanity (*n*).

A married woman is at common law unable to enter into a contract at all (*o*). By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-ss. 2, 3, and 4, she can now bind herself only if she has separate estate at the time of entering into the contract (*p*) which is free from restraint upon anticipation, and the separate property free must be such as she could fairly be said to contract as to. The mere fact of having 3*l.* or 4*l.* when she entered into a covenant to repay 400*l.* would not enable her to contract (*q*), and judgment can only be enforced against her for the amount of separate estate, if any, as to which there is no restraint on anticipation (*r*). The Act does not enable her by means of a contract entered into at a time when she has no existing separate property to bind any possible contingent property she may subsequently acquire (*s*). Nor is the Act retrospective in the sense of rendering after-acquired separate estate liable to be taken in execution on a contract made by a married woman after the Act came into force (*t*). By the same Act a married woman can now be made liable in tort to the extent of her separate property. It would therefore seem to follow that she can only acquire the legal position of a principal to the extent that she had separate property.

Married women incapable, except so far as separate estate.

The Married Women's Property Act of 1893 (*u*), which

Married Women's

(*m*) Pollock on Contracts, 5th ed. p. 88.

(*n*) *Drew v. Nunn* (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591.

(*o*) *Fairhurst v. Liverpool Adelphi Loan Association* (1854), 9 Ex. 422, at p. 429.

(*p*) *Palliser v. Gurney* (1887), 19 Q. B. D. 519; *Everett v. Paxton* (1891), 65 L. T. 383.

(*q*) *Braunstein v. Lewis* (1891), 65 L. T. 449.

(*r*) *Scott v. Morley* (1888), 20 Q. B. D. 120. See also *Hill v. Cooper*, (1893) 2 Q. B. 85.

(*s*) *In re Shakespeare, Deakin v. Lakin* (1885), 30 C. D. 169.

(*t*) *Conolan v. Leyland* (1884), 27 C. D. 632.

(*u*) 56 & 57 Vict. c. 63.

Property Act, 1893, came into effect on the 5th December, 1893, considerably alters the law. By sect. 4 it repeals sub-sects. 3 and 4 of sect. 1 of the Married Women's Property Act, 1882; and by sect. 1 it enacts that "Every contract hereafter entered into by a married woman, otherwise than as agent—

- (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;
- (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and
- (c) shall also be enforceable by process of law against all property which she may thereafter while discreet be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract, any separate property which at that time or thereafter she is restrained from anticipating."

Sect. 2 enacts, "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Divorce or judicial separation enable a married woman to be a principal.

By the Divorce and Matrimonial Causes Act she is restored to the position of a non-married woman if she has been divorced, judicially separated, or has obtained a protection order (*r*).

Under the 41st section of the Conveyancing Act, 1881, a married woman, whether an infant or not, can appoint

by deed an agent to execute a deed or do any other act she could do herself (*w*).

There is, however, one position in which both married women and infants can act as principals, which seems of somewhat an exceptional nature: they can both be executors; but on the principle of the case above alluded to (*x*), a married woman would seem only to be personally liable to the extent of her separate property, and an infant would not seem to be liable at all personally (*y*). An executor is, however, not a real exception, since there he is "a person put in the stead of the deceased person, and acting in a semi-representative capacity," and not in his own right.

Married woman can be executor.

Aliens are under no disability, and can therefore be principals. Convicts, however, cannot, as they are unable to contract, except while at liberty, lawfully (*z*).

Aliens or convicts.

In considering who may be an agent a different set of considerations arise. As the contract of the agent is not his contract but that of the principal, there is no need for his being *sui juris*, and married women and infants may be agents. But a lunatic, probably, could not be an agent, because the exercise of a sound judgment and discretion seems to be required for the exercise of the authority. Sir William Anson, therefore, lays it down broadly that anyone may be an agent (*a*). If, however, a person takes up a position inconsistent with his being agent the contract will not be enforced (*b*); and he will not be allowed commission as being in the position of agent (*c*). This branch of the subject will be dealt with under the head of the duties of an agent (*d*).

Anyone may be agent.

(*w*) 44 & 45 Vict. c. 41.

(*x*) *In re Shakespeare, Deakin v. Lakin* (1885), 30 C. D. 169.

(*y*) *Hindmarsh v. Southgate* (1827), 3 Rus. 324.

(*z*) 33 & 34 Vict. c. 23.

(*a*) Anson on Contracts, p. 327, 6th ed.

(*b*) *Panama and South Pacific Tel. Co. v. India Rubber, &c. Works Co.* (1879), 10 Ch. 515; and see *Harington v. Victoria Dock Co.* (1878), 3 Q. B. D. 549.

(*c*) *Robinson v. Mollett* (1874), 7 H. L. 802.

(*d*) *Infra*, See Duties of Agent,

Exceptions.

There are, however, some few exceptions to the general rule that anyone may be an agent. Only persons authorized to act under written authority of the County Court judge can act as agents for levying distress (*e*). An infant cannot be an attorney to prosecute a suit (*f*); nor can a married woman, probably since it has been considered that she is only capable of being sued in matters relating to herself personally (*g*). A man may also have made himself incapable of acting as agent for a certain person by his position with respect to the subject-matter: as, for instance, a man cannot sign a contract as agent for one party if he himself is the other party (*h*); for one of the parties cannot be agent of the other for the purpose of signing the contract.

Some agencies
require special
qualifications.

Although anyone may act as agent, yet there are a number of agencies in which a man cannot act unless specially qualified: as, for instance, a solicitor or stockbroker; and in others, he must have taken out a special licence of some kind. No person is allowed to act as solicitor unless he has been admitted and enrolled a solicitor (*i*), and anyone doing so is guilty of an indictable offence (*j*) and of contempt of Court, and liable to a fine of 50*l.* for every such offence (*k*). Not only is he incapable of recovering any fees or disbursements, but a person employing such an uncertificated person is unable to recover any costs or disbursements which the other side would otherwise have to pay him (*l*).

Question may
arise as to
who is agent's
principal.

Sometimes questions of fact arise as to whose agent a person was, as in *Gibbons v. Proctor* (*m*), where the whole question as to whether the plaintiff was entitled to a reward depended on whether the persons to whom he gave

(*e*) Distress Amendment Act, 1888, s. 7.

(*f*) *Heave v. Greenbank* (1749), 3 Atk. 695, at p. 710.

(*g*) *Thynne v. St. Maur* (1887), 34 Ch. D. 465.

(*h*) *Wright v. Dannah* (1813), 3 Camp. 203; *Sherman v. Brandt*

(1871), L. R. 6 Q. B. 720.

(*i*) 6 & 7 Vict. c. 73, s. 2.

(*j*) *R. v. Buchanan* (1846), 8 Q. B. 883.

(*k*) 23 & 24 Vict. c. 127, s. 26.

(*l*) *Fowler v. Monmouthshire Canal Co.* (1879), 4 Q. B. D. 334.

(*m*) (1891), 64 L. T. 594.

certain information were his agents to give information to the defendant, or agents of the defendant to receive information. If they were the plaintiff's agents, then the information had been given after the offer of a reward. If they were the agents of the defendant, then it had been given before the offer, and he was not entitled to claim under it, as he had done nothing in consequence of the offer.

CHAPTER III.

JOINT PRINCIPALS AND JOINT AGENTS.

Joint Principals.

Joint principals partners.

IN a partnership every partner is a principal, and is also the agent of his co-partners in any firm business, within the authority vested in him either by the partnership deed or by law.

Joint adventurers.

Persons without entering into partnership may make themselves jointly liable, and by permitting someone to act for them all, make him their joint agent. Thus persons who give an agent authority to order things are jointly liable for goods supplied to him. Mr. Justice Field held, in *Pilot v. Craze*, that when persons are engaged in one common object each and every one is responsible for the acts of the other done in pursuance of the common object (*a*).

Provisional committee.

When a person allows his name to go down on a committee or a provisional committee, that of itself amounts to no more than a promise that he would act with the other persons for the purpose of carrying out the particular scheme (*b*). It makes no difference in point of law whether the object of the scheme is gain or charity: though, as Chief Baron Pollock pointed out, the result may be practically very different, exciting an improper prejudice in the minds of a jury. If the names are circulated in a prospectus with other matter the liability depends on the question what inference ought a reasonable man to draw

(*a*) (1885), 52 J. P. 311; *Steele* L. T. 658.

v. Gourley (1886), 3 Times, 772;
but see *Hawke v. Cole* (1890), 62

(*b*) *Reynell v. Lewis* (1846), 15 M. & W. 517.

from the contents of that paper. If a person allows himself to be appointed a member of a committee, hears their arrangements, attends meetings, and allows his name to be used, he renders himself liable for all that the secretary or the committee do in pursuance of the purposes of the committee, if anyone contracts with the committee or secretary on the faith of his name amongst the others, and looking to the committee for payment and not the possible funds (c); the liability of a member of a committee depends on whether he did not take part in giving the orders. As to this class of cases, see "Liability of Agents."

Members of committee.

The joint ownership of land or a chattel, with a separate and distinct, though possibly undivided, interest in it, does not make such joint owner liable for the acts of one of the other joint owners, or make such joint owner his agent (d). It has, indeed, been decided that notice to quit by one joint tenant is sufficient to determine the lease; but that is not because the joint tenant who has given the notice is agent for the rest, but owing to the nature of the estate and interest they all have in the land, holding it *per mie et per tout* (c). In order to constitute persons joint principals there must be an agreement to join together, and either authorize one of their number to act for the others or else appoint some outsider as their agent: for the words "joint principals" imply that several principals have jointly given an authority to one or more agents to act for their common purposes.

Joint ownership does not involve being a joint principal.

How persons may become liable as joint principals.

The joint ownership of land or a chattel is not necessarily the result of any agreement, and one of the co-owners can, without the consent of the other owners, transfer his interest to a stranger, so as to put him in the same position as he himself was in. A co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of the common debt. If

Joint ownership, how distinguished.

(c) *Bailey v. Macaulay* (1849), 13 Q. B. 815, at p. 826.

(c) *Doe v. Somerset* (1830), 1 B. & A. 135.

(d) Story, § 38.

several people buy something in common, and agree to sub-divide it among themselves, they need not necessarily be joint principals, for one may buy the goods as principal and not as agent, and then divide the article amongst the others. In this case the others will not be liable to the vendor for the price, or even their share of it (*g*). If several co-owners of a thing combine and sell, or authorize the sale of that whole thing, the authority they confer is an authority given by them all collectively, and not several authorities given by them separately, and they will be all liable under it (*h*).

Tenants in common.

Joint owners of ships, how far joint principals.

Not joint principals unless have appointed a managing owner.

One of several tenants in common has no power as such to appoint an agent for the rest. Story says that there is some peculiarity in the law as to part owners of ships, growing out of the necessary adaptations of it to the requirements and convenience of commerce, and that though they are tenants in common holding distinct and undivided interests, yet each is deemed the agent of the others as to the ordinary repairs, employment, and business of the ship in the absence of any known dissent. The case he refers to does not seem quite to bear this out (*i*), for Mr. Justice Erskine held that the plaintiff, who had done the repairs, was bound to show that the other co-owner had authority to pledge the defendant's, the other co-owner's credit, and said that a managing owner would have implied authority; and Mr. Justice Coltman, with approval, quotes from a judgment of Mr. Justice Bayley (*k*) the following: "Where a ship is under the management of the master, and the owners divide the profits, the master is *prima facie* agent for them all, but the mere legal ownership does not make any person liable for a ship's debts." And Mr. Justice Coltman held that the owner of a share in a ship who had been appointed managing

(*g*) *Cooper v. Eyre* (1788), 1 H. Bl. 37; see also *Hoare v. Dawes* (1780), 1 Doug. 371.

(*h*) *Kear v. Fenwick* (1876), 1 C. P. D. 745, at 752.

(*i*) *Curling v. Robertson* (1844), 7 M. & Gr. 336.

(*k*) *Briggs v. Wilkinson* (1827), 7 B. & C. 30.

owner by the owners of the other shares, "would have implied authority to bind those who had a beneficial interest in the ship, in the absence of any dissent on their part;" and the reason of this exception is plain, as a managing owner has by agreement been made the agent of all the co-owners in the management of their property—the ship.

In *Brodie v. Howard* (l), Chief Justice Jervis said that the authority of a part-owner to charge the credit of the others for necessary repairs exists, and continues only until countermanded. He is entitled, until he has notice to the contrary, to assume that he has authority to bind them; and a tradesman to whom a part-owner has been held out as having authority may in like manner assume it to continue until he has express notice that the authority has ceased. That case was also a case of orders given by a managing owner, or rather a co-owner who always acted as managing owner. The co-owner who was sued had told the managing owner in June that he did not wish to employ the ship any more. The managing owner, however, ordered the repairs to the ship, which were commenced on the 29th of August. The defendant gave no notice to the shipwright that he would not be responsible for them until the 10th of September, and yet the Court held he was not liable, and that the repairs must be considered as ordered on the credit of the managing owner alone.

The cases in which the rule, as stated by Mr. Justice Bayley; has been recognized, are all cases where the co-owner was also the managing owner or ship's husband (m). In *Abbott's Merchant Shipping* the rule is, however, similarly laid down, except that the words "unless their liability (the co-owners') be expressly guarded against" are

(l) (1855), 17 C. B. 109.

(m) See *Chappell v. Bray* (1860), 30 L. J. Ex. 24.

added (*n*). A co-owner is, however, not liable for insurance of a ship unless he has given express authority (*o*), or for the expenses of a lawsuit (*p*).

Effect of judgment against one of several joint contractors.

A judgment against one of several joint contractors is, even without satisfaction, a bar to an action against any other joint principal sued alone (*q*).

Joint Agents.

Usually all joint agents must concur in acts.

Story lays it down as a general rule of the common law that where an authority is given to two or more persons to do an act, the act is valid to bind the principal only when all of them concur in doing it; for the authority is construed strictly, and the power is understood to be joint and not several. Coke (*r*) says, if A. makes letter of attorney to B., C., and D., *conjunctim et divisim* (jointly and severally), to make livery. If only two make livery it is void, because it is neither *conjunctim* nor *divisim*; but if one makes livery in one parcel and another in another parcel it is good. But if two make livery in the presence of the third, he not saying anything, it seems good, on the principle that when a person is present and he allows a thing to be done by a third party, the person doing it is regarded as acting only as the instrument or tool of the other. When any of the joint agents die the authority does not survive to the survivors, for Coke says (*s*), where a naked power (one not clothed with any beneficial interest) is vested in two or more *nominatim* without any reference to his office in its nature liable to survivorship, as an executorship is, it, without doubt, would be a contradiction of the

Authority of joint agents does not survive.

(*n*) Abbott on Merchant Shipping, 13th ed. p. 96.

(*o*) *French v. Backhouse* (1771), 5 Bur. 2727.

(*p*) *The Belleairn* (1886), 5 Asp. Mar. Law Cas. (N.S.) 582; and see cases referred to in Abbott on Merchant Shipping.

(*q*) *Kendall v. Hamilton* (1869), 4 Ap. Cas. 504. See, also, *Cambeport v. Chapman* (1887), 56 L. J. Q. B. 639; 19 Q. B. D. 229.

(*r*) § 42; Coke upon Littleton, 52 (b), n. 2.

(*s*) 113 a, n. 2.

general rule to allow the power to survive. Therefore, when authority has been given to two or more persons jointly to act as agents, their acts are only binding on the principal when all concur. And when a power was given jointly and severally, the older cases showed that it has to be executed by one or by all, unless the donor of the power clearly showed he intended the execution to be good if it were executed by some one of them; as, for instance, by using the words "or any of them," after giving the joint and several power.

Coke (*t*) points out there is a difference as to survivorship between "authorities created by the party for private causes and authorities created by the law for the execution of justice," and gives as an example a direction by the sheriff to four persons jointly to arrest a person which could be executed by two, because it is for the public benefit and should therefore be more "favourably expounded than when it is only for private;" and this distinction has been applied to public bodies and public power generally, and, therefore, a distress warrant which was a joint warrant and not a joint and several one, was held to be well executed by one of the persons it was addressed to (*u*). In the case of public authorities, therefore, the common law rule is not so strict in several cases, and it has been held that the authority could be exercised by a majority. In one of the cases, *Attorney-General v. Darcy* (*x*), the question arose whether the majority of a body incorporated by charter could elect a chaplain, and it was held they could; and, similarly, in *Withnell v. Garthan* (*y*), where the same question arose as to the appointment of a schoolmaster, it was held that the majority could appoint; in *King v. Beeston*, it was decided that it was not necessary that

When authority for public purpose it survives.

(*t*) Coke upon Littleton, 181 b.

(*u*) *Lee v. Vesey* (1856), 1 H. & King v. Beeston (1790), 3 Term Rep. N. 90. 592.

(*x*) (1741), 2 Atk. 212.

all the churchwardens and overseers should concur in a contract for providing food for the poor.

A majority or quorum can exercise a joint authority for a public purpose.

A case (z) came before Chief Justice Eyre as to whether four out of six tryers (inspectors) of tanned leather, appointed under an Act of Parliament to prevent badly prepared leather being sold in the market, could exercise the powers of the Act. In his judgment, Chief Justice Eyre, speaking of the general rule of law as to bodies of men entrusted with public powers, says: "I think it is now pretty well established that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will include the minority, and their act will be the act of the whole." The cases of corporations go farther: there it is not necessary that the whole body should meet; it is enough if notice be given to all the members; a majority, or a lesser number, according as the charter may be, may meet, and when they have met they become just as competent to decide as if the whole had met.

Directors of companies.

Directors of companies are the agents of the companies they belong to, and questions have often arisen as to whether powers could be exercised by only some of them. Lord Justice Lindley says: "Speaking generally, it is clear that if a person appoints six others to be his agents jointly, he is not bound by the acts of any five, four, three, two, or one of them. Therefore, if the affairs of a company are entrusted to the management of not less than a fixed number of directors, it is *prima facie* not bound by the acts of a fewer number" (a). He then gives cases where acts done by less than the whole number were held invalid, and says it must not, however, be supposed that the majority of a duly convened and duly constituted board of directors cannot act for the whole

(z) *Grindley v. Barker* (1793), 1 B. & P. 229.

(a) Lindley on Companies, 5th ed. pp. 155, 156.

board. Business could not be carried on if such a rule were to prevail. Company law not being within the scope of this work, the reader is referred to the Lord Justice's learned work for further information.

The latest case as to the power of a less number than the whole of the joint agents to bind the principal is one decided in 1849 (*b*). That was a case where the provisional committee of a railway company delegated their powers to a managing body of eight. This was done by way of a resolution, which decided that the eight persons (naming them) should be the managing committee for the company, and that they should take "the most energetic measures to further the interests" of the company. Six out of the eight gave an order to the plaintiff, and on the strength of the order it was sought to make a member of the provisional committee liable. Counsel for the plaintiff argued that the execution by six was a good exercise of the authority, and relied on the statement in *Story* that, though the common law was so strict, yet it was not inflexible, and admitted of a more liberal interpretation in favour of trade and also on an underwriting case (*c*), in which a shipowner had given authority to fifteen persons jointly and severally to underwrite policies of insurance for him, where it had been held that, owing to the inconvenience of the rule it would be extended no further, and that an execution by four out of the fifteen was sufficient. Lord Denman, C.J., however, held that in the absence of evidence as to the constitution of the railway company, an authority given to eight could not be executed by six, although it was very probable that a majority of the managing committee were intended to act.

Prima facie authority is only valid if executed by all the joint agents.

Chief Justice Abbott in *Guthrie v. Armstrong* (*d*), decided that the execution by four of the power of

Query, where rule applies to mercantile agency.

(*b*) *Brown v. Andrew* (1849), 13 Jur. 938.

(*c*) *Guthrie v. Armstrong* (1822), 5 B. & Ald. 628.

(*d*) *Ubi supra*.

attorney given to fifteen was good; and he based his decision on what he held to be the true construction of the power given by the principal in that case, which, after naming the persons, constituted them "his true and lawful attornies, jointly and separately for him and in his name, to sign and underwrite all such policies of insurance as they, his said attornies, or any of them, should jointly and separately think proper." This decision, and a decision of Chief Justice Wilnot in *Godfrey v. Saunders* (e), that a person who consigned goods to two factors jointly, by doing so implied that one could trust the other to sell alone, though both were responsible to the consignor, are quoted in text-books as showing that in commercial transactions the strict common law does not apply, thus forming a second exception to the common law rule.

Clubs.

Members of clubs, although the club is owned by the general body of members, are not joint principals, nor are the committee joint agents for the club; for a club is neither a partnership nor a corporation (f), and is a body whose existence is not legally recognized (g). Although a member can be sued for his subscription, he is not liable to creditors of the club, unless he personally pledged his credit for goods supplied. A tradesman has therefore only the credit of the person ordering to rely on.

Agent liable
who has no
principal.

In some cases, persons contracting apparently as joint agents have been held liable as joint principals, because there was no other responsible principal to whom recourse could be had. These were cases of persons acting judicially in some public official character, as magistrates, commissioners, enclosure commissioners, overseers, &c. As to these cases, see the Chapter on the "Liability of Agents."

(e) (1768), 3 Wils. 94, at p. 114.

(g) *Crossman v. Granville Club*

(f) *Fleming v. Hector* (1837), 2
M. & W. 172.

(1884), 77 L. T. Newspaper, 48.

CHAPTER IV.

APPOINTMENT OF AGENT.

THERE is no necessity for any formal appointment of an agent in most cases. An agent can be appointed by word of mouth or by writing, and mere acquiescence in the acts of a person who assumes to act as agent may, by estoppel, render the principal liable to third persons for such person's acts (*a*).

Agent, how appointed.

A principal cannot adopt a bare act the effect of which would be to raise a duty towards and subject a third party to damages for its non-performance. Such an act can never, if unauthorized at first, be confirmed by any recognition *ex post facto*; for instance, a demand for property in order to found an action for trover must be made by an agent previously authorized (*b*).

An unauthorized act cannot be adopted which gives rise to a duty by a third party.

If the agent has to do anything by deed, his authority to sign and seal the instrument must be given by deed (*c*). Sales of real property and leases beyond a certain time have, by the Act to Amend the Law of Real Property, 1845 (*d*), and other Acts, to be by deed. There is an apparent exception to this rule, viz., that an appointment by deed is not necessary when the principal is present and the act done before him. When the principal is present the agent is, however, not really acting as an agent; but is merely acting as the tool by which the principal carries out his intentions. This is clear when the grounds of the

When agent's act must be by deed, must be appointed by deed.

(*a*) See Story, § 47.

(*b*) See Smith's Mercantile Law, p. 165; *Coore v. Calloway* (1794), 1 Esp. 115; *Coles v. Bell* (1809), 1

Camp. 478, n.

(*c*) *In re Whitley Partners* (1886), 32 C. D. 337.

(*d*) 8 & 9 Vict. c. 106.

decision of the case (*e*) cited in support of the exception are examined. It was a case in which a father and a son (neither of whom was able to write) asked a third party to sign, seal and deliver an indenture of apprenticeship. Under such circumstances the Court held the deed to be that of the father and son.

Agent must be appointed in writing where the authority must be exercised in writing by the Statute of Frauds.

Lord Eldon, in *Mortlock v. Buller* (*f*), held that it would be a most mischievous evasion of the Statute of Frauds if it were permitted to appoint an agent by word of mouth or give him verbally authority to do something which the statute required him to do in writing; for the same difficulty would arise in ascertaining what the verbal authority was as the statute was designed to obviate and avoid in the agreement itself, and thus the difficulty would be reintroduced. Agents to execute powers, therefore, under the 1st, 2nd and 3rd sections of the Statute of Frauds, have to be appointed in writing.

Distinction between trading and non-trading corporations. Non-trading corporations.

The law as to the appointment of an agent by a corporation differs according as to whether the corporation is a trading corporation or a non-trading corporation.

As to the latter, the rule is that a corporation cannot act except by deed (*g*). Lord Denman pointed out, in *Church v. The Imperial Gas Light Co.* (*h*), the only exceptions to this rule so far as non-trading corporations are concerned. He says: "The general rule of law is that a corporation contracts under its common seal; as a general rule it is only in that way that a corporation can express its will or do any act. That general rule has from the earliest traceable period been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a mere circumstantial difference

(*e*) *Ball v. Dunsterville* (1791), 4 T. R. 313.

(*f*) (1804), 10 Ves. 291, at p. 310.

(*g*) *Mayor of Ludlow v. Charlton* (1841), 6 M. & W. 815.

(*h*) (1838), 6 Ad. & E. 846.

is to exclude from the exception. *This principle seems to be convenience amounting almost to necessity.* Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence, *the retainer by parol of an inferior servant, and the doing of acts very frequently recurring, are established exceptions.*" In that case the company, being formed for the supply of gas, it would have seriously impeded the corporation in its purposes to hold that it was necessary that a contract for such supply should be under seal.

In *Arnold v. The Mayor of Poole* (i), the Court held that the appointment of a solicitor to conduct important suits affecting the rights of the Corporation of Poole could not be considered a trifling matter, nor was it of such frequent occurrence or of such immediate urgency as to render it inconvenient to postpone it until the seal of the corporation could be affixed to the retainer. And Chief Justice Tindal held it could not be said that the retainer of an attorney fell within the principle of the decisions relating to contracts made by corporations established for trading purposes. Baron Rolfe said, in holding that a municipal corporation could not be sued on a parol contract for labour in pulling down a house and altering the roadway (k), "a corporation which has a head may give a personal command and do small acts, and it may retain a servant. It may authorize another to drive away cattle damage feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or admitting of so little delay, that to require in every such case a previous affixing of the seal would be greatly to obstruct the every-day convenience of the body corpo-

(i) (1842), 4 M. & G. 860; and see *Cope v. Thames Haven Dock Co.* (1849), 3 Ex. 841; *Sutton v. Spectacle Makers Co.* (1864), 10 L.

T. N. S. 411.

(k) *Mayor of Ludlow v. Charlton* (1841), 6 M. & W. 815.

rate without any adequate object. In such matters the head of the corporation seems from the earliest time to have been considered as delegated by the rest of the members to act for them."

In *Wells v. The Mayor of Kingston-upon-Hull* (*l*), it appeared that the Corporation of Kingston were in the habit of letting a graving dock verbally to any shipowners who required its use; vessels being admitted in the order of their application for the use of the dock. In an action by a shipowner for not letting his ship in in its turn, the corporation raised the defence that the contract was not under seal, but the Court of Common Pleas, composed of Lord Coleridge, Baron Huddleston, and Mr. Justice Denman, held that as the admission of a ship was a matter of frequent occurrence, and in some cases might be a matter of urgency admitting of no delay, it came well within the description given in *Church v. Imperial Gas Light Company* (*m*) of the kind of acts which might be done by a corporation without their seal.

If a solicitor has acted for a corporation in an arbitration without being appointed under seal, the award could probably not be enforced against it; but if the corporation attempts to set an award aside only on the ground that the arbitrator has exceeded his jurisdiction, it will not be able to raise the point (*n*).

Local boards
acting under
Public Health
Act, when
sealing
necessary.

Under the Public Health Act, 1875, s. 174, "every contract made by a local board, or by an urban sanitary authority, whereof the value or amount exceeds 50*l*., shall be in writing, and sealed with the common seal of such authority;" it was therefore held in *Hunt v. Wimbledon Local Board* that the board were not liable to pay an architect for plans that he had made under verbal directions from the board's surveyor (*o*). This 50*l*. limit may,

(*l*) (1875), L. R. 10 C. P. 402.

(*m*) (1838), 6 A. & E. 846.

(*n*) *Faviell v. Eastern Co. Rail.*

Co. (1848), 2 Ex. 344.

(*o*) See, also, *Hunt v. Wimbledon*

Local Board (1878), 4 C. P. D. 48.

perhaps, be taken as some kind of guide as to what matters in the case of other corporations are so trivial that they need not be by deed. This Act came before the House of Lords in a case (*p*) where the corporation was a municipal corporation, but in the transaction which was sued on was acting as a board of health. The House of Lords confirmed the decision in *Hunt v. Wimbledon Local Board*, but expressly refrained from deciding whether the plaintiff could sue under the contract for goods supplied if the municipal body had been acting under its ordinary powers, and had not been under a statutory limitation to contract only under seal, where the value of the goods or subject-matter of the contract was over 50*l*. The judges expressed their opinion that it was for the protection of the public that contracts of corporations should be under seal, for they could not then slip through unobserved, and there was less chance of a public body being defrauded by its servants, who might enter into all sorts of obligations for it. In *Nicholson v. Bradfield Union* (*q*), the Court of Queen's Bench held a union liable to pay for goods; as the goods had actually been supplied to and accepted by the corporation, and were such as had necessarily to be from time to time supplied for the many purposes for which the body was incorporated, and also were supplied under a contract in fact made by the managing body of the corporation.

In the case of tenancies of land where possession has been taken, the Courts have enforced the contract for a lease, although it was not under seal, thus the Court of Exchequer held, in *Ecclesiastical Commissioners v. Merral*, that a tenant who had been in possession, but whose lease was not under seal, was under an obligation to repair. They did this on the authority of *Wood v. Tate* (*r*), which decided that though a lease by a corpora-

Tenancies of
land where
lease not
under seal.

(*p*) *Young & Co. v. Mayor of Leamington* (1883), 8 App. Cas. 517.

(*q*) (1866), L. R. 1 Q. B. 620.

(*r*) (1806), 2 B. & P. N. R. 247.

tion was void because it was not executed under their common seal, yet if the tenant was allowed to enter into possession, and both parties acted as if there was a binding tenancy, an implied obligation arose on the part of the corporation to do everything that is to be found in the usual annual lease, and that a correlative obligation was on the tenant to pay the rent and perform the ordinary stipulations. In *Lowe v. London and North-Western Railway* (*s*), a corporation was held liable for the use and occupation of land they had occupied, although the lease was not under seal. Both in the cases of *The Ecclesiastical Commissioners v. Merral* and in *Nicholson v. Bradfield Union* the Courts seem to recognise the distinction between an agreement not under seal which is executory and one which is executed, enforcing the latter to avoid doing an injustice: the first case was decided by Chief Baron Kelly and Barons Bramwell, Pigott and Cleasby, and the other by Mr. Justice Blackburn. Mr. Evans, in his work on Principal and Agent (*t*), however, says the distinction is exploded, though the cases he refers to do not appear to the present writer to bear out that view.

Trading corporations.

A trading corporation is an exception to the rule that a corporation can only contract by deed. Where the contracts relate to the objects and purposes for which the corporation has been formed, a deed is not necessary. Chief Justice Bovill, in *South of Ireland Colliery Co. v. Waddle* (*u*), explained the exception thus: he says—“Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants, and the like. But in progress of time, as new descriptions of corporations came into existence, the Courts came to consider whether

(*s*) (1852), 1 E. & B. 632.

(*t*) 2nd ed. p. 23.

(*u*) (1868), L. R. 3 C. P. 463; affirmed (1869), 4 C. P. 619.

these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict, and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by recent cases are too firmly established to be questioned by the earlier decisions, which, if inconsistent with them, must be held not to be law. *These exceptions apply to all contracts by trading corporations entered into for the purpose for which they are incorporated.* A company can only carry on business by agents—managers and others, and if the contracts made by these persons are contracts which relate to the objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding on the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument. It can never be that one rule is to obtain in the case of a contract for 50*l.* or 100*l.*, and another in the case of a contract for 50,000*l.* or 100,000*l.*” The Chief Justice distinguished the case of *The London Dock Co. v. Sinnott* (*x*), on the ground that the contract there was not of a mercantile character. In that case the Dock Company, who were a trading corporation, made a contract quite outside the ordinary course of their business, and not of a mercantile nature, as the Court held, for scavenging the dock and selling old wood hoops, and it was held that the Dock Company had no power to make such a contract by parol.

A joint-stock company can act under their common seal, or by signature of its directors—which may have the same effect as their seal—or possibly by resolution of the board. An agent cannot, however, claim to be ap-

Joint-stock
companies,
how agents
appointed.

(*x*) (1857), 8 E. & B. 347; 27 *Mines Co. v. Fox* (1851), 16 Q. B. L. J. Q. B. 129; and see *Copper* 229.

pointed if there is simply an agreement between other parties to appoint him. If, for instance, the articles of association of a company—which are the statement of the arrangements between the shareholders—provide that a certain person is to be solicitor to the company, the solicitor in question cannot sue on such a proviso or article, as he is no party to it (*y*).

Who can
affix seal.

Questions sometimes arise as to who can use the seal of the company. It seems that whoever as a matter of practice manages the affairs of a trading corporation must of necessity be able to use the seal for those acts he is authorized to perform. Therefore, where neither an Act of Parliament nor the memorandum of association prescribed any formalities as to the method of affixing it, an affixing the seal by the directors and the secretary of a company was held sufficient (*z*).

Agent may
be appointed
verbally
though autho-
rity executed
by writing.

If an agent contracts by deed when he was only authorized to do so by writing, and the deed is unnecessary for the carrying out of the contract, it is good against the principal as a writing (*a*). An agent may be appointed by word of mouth to do something, although that something may have to be performed by writing, as by affixing his (the agent's) signature, provided always that a statute like the Statute of Frauds does not require the authority to be in writing: for example, an agent may, by a verbal authority, or an implied authority, sign and indorse a promissory note. And it was therefore held, in *Eley v. Positive Government Assurance Co.*, that an agent who had only been verbally authorized, could sign the memorandum of association of a company, although it was made by Act of Parliament equivalent to signing and sealing. Mr. Justice Blackburn laid down the rule as follows, in a judgment which was cited with approval in the Court of

(*y*) *Per* Lord Cairns, *Eley v. Positive Government Life Assurance Co.* (1876), 1 Ex. Div. 88.

(*z*) *In re Barned's Banking Co.*,

Ex parte The Contract Corporation (1868), 3 Ch. 105.

(*a*) *Hunter v. Parker* (1841), 7 M. & W. 322, at p. 344.

Appeal (b): "At common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it. Nevertheless, there may be cases where the statute requires a personal signature. The common law rule, *qui facit per alium, facit per se*, will not be restricted except where a statute renders personal signature necessary."

An agent is only required to be duly authorized to make an acknowledgment of debts to bar the Statute of Limitations (c); but an agent cannot bind his principal, whether he be authorized by deed or otherwise, by making a representation concerning the character, conduct, credit, ability, trade or dealing of any other person, for the purpose that such other person may obtain credit, money, or goods; for such a representation, to make a person liable, must be made in writing signed by the person himself (d). In *Swift v. Jewsbury*, a bank manager made a representation as to the credit of a customer, and, as the Court held, in his personal capacity. If he had signed the bank's name, and been authorized to do so, the bank would still not have been bound according to the decisions in the case. To bind the bank, the directors, or persons authorized by the articles of association, would have had to put the company's seal, and doing this would only have bound the bank if the articles of association gave them authority to make such a representation.

There cannot be an agent for the purpose of making representation as to character.

A solicitor ought to be appointed in writing, and ought to obtain a written authority from his client before he commences a suit. If circumstances are urgent, and he is obliged to commence proceedings without such authority, he should obtain it as soon afterwards as he can. An authority may, however, be implied where the client

Solicitor ought to be appointed in writing.

(b) *Reg. v. Justices of Kent* (1873), L. R. 8 Q. B. 305; and see *Eley v. Positive Government, &c.*, *ubi supra*.

(c) 19 & 20 Vict. c. 97, s. 13.

(d) *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301.

Writing
necessary
where agency
for more than
a year.

Power of
attorney.

Agent of
necessity.

acquiesces in and adopts the proceedings; but if the solicitor's authority is disputed, it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the Court will treat him as unauthorized, and he must abide the consequences of his neglect (*e*). If the business is not to be performed within a year, or where a person guarantees costs on behalf of another, under the 4th section of the Statute of Frauds, a retainer in writing is necessary (*f*).

Where the authority is given formally by deed, it is called a power of attorney. Where agents have to execute legal documents, or to represent their principal abroad, or in a general capacity, the agent is usually appointed by power of attorney: in some of the Colonies these must be witnessed by two witnesses.

The relationship of principal and agent will not be implied to exist from the necessity of the thing (*g*). In a case where a doctor brought an action against the Midland Railway for services he had rendered to persons injured in an accident, it was argued that the station master, who had him sent for, was from the necessity of the case authorized to employ him. The Court, however, held there was no such power, the employer of an agent for a particular purpose gives only the authority that is necessary for that agency under ordinary circumstances (*h*).

In *Eastland v. Burchell* (*i*), Justices Lush and Mellor held that a wife became an agent of necessity to supply her wants on her husband's credit when he neglected his duty; but that only was so because the law imposed upon him the duty of maintaining her.

Sir Montague Smith, in giving judgment in *Bank of New South Wales v. Owston*, said:—"An authority to be

(*e*) *Allen v. Bone* (1841), 4 Beav. 493.

(*f*) *Tomlinson v. Gell* (1837), 6 Ad. & E. 564.

(*g*) *Cox v. Midland Rail. Co.* (1849), 3 Ex. 268.

(*h*) See, also, *Hawtayne v. Bourne* (1847), 7 M. & W. 595.

(*i*) (1878), 3 Q. B. D. 432.

exercised only in cases of emergency is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show commonly that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to (*viz.*, the authority of a clerk of a bank to arrest a forger in the act of presenting a forged cheque), the question whether the emergency existed or might reasonably have been supposed to exist arises for decision, and that question raises issues beyond the mere fact that the agent acted on behalf of, and in the supposed interests of, the principal. Were it otherwise, the special authority would be equivalent to the general one." In that case the Court held that the principals (the bank) were not responsible for the acting bank manager having authorized criminal proceedings to be taken against a merchant in a good position, in order to obtain more quickly from him a bill the bank claimed, and held the act of the manager without authority (*a*).

(*a*) (1879), 4 Ap. Cas. 270, at Chapter on "The Authority of the Agent" as to authority to arrest.
p. 290. See also the cases cited in

CHAPTER V.

RATIFICATION.

By ratification, principal becomes responsible for unauthorized acts.

Form of ratification.

Knowledge of circumstances necessary.

Only act of agent, or would-be agent, can be ratified.

WE have considered hitherto the appointment of the agent and the authority given to him by such appointment. We now have to consider the doctrine of ratification, whereby the principal may make himself responsible for contracts and acts of his agent outside his authority, and also adopt as his own the acts or contracts of a person who was not at the time of doing them his agent. The ratification may either be verbal, by letter, or inferred from mere acquiescence; but if the act of the person who purported to act as agent was under seal, the ratification must also be so; for, as Mr. Justice Story points out, the ratification cannot in this respect stand upon higher ground than an original authority (*a*). To make a ratification good as an adoption of the agent's acts by the principal, it must have been done with a knowledge of all the circumstances (*b*), or else with an intention to take upon himself, without inquiry, the risk of any irregularity which the agent has committed, and to adopt all his acts (*c*).

Only the acts of an agent, or a person assuming to act as such, can be ratified, and the principal cannot ratify an act done by someone either on behalf of himself or on behalf of a third party. Chief Justice Tindal, in holding that an act done by an agent on behalf of A. could not be

(*a*) § 242.

(*b*) *Smith v. Cologan* (1786), 2 T. R., note, p. 188.

(*c*) *Lewis v. Read* (1844), 13 M. & W. 834; *Freeman v. Rosher* (1849), 13 Q. B. 780.

ratified by B. (d), took this distinction, and said: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year Book, 7 Henry 4, fo. 35a, that if the bailiff took the heriot, claiming the property in himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time as the bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson, C. J., in Godbolt's Reports, 109 (b), 'If one have cause to distrain my goods, and a stranger of his own doing, without any warrant or authority given him by the other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot, for once he was a trespasser, and his intent was manifest.'" Lord Justice Thesiger, in *Jones v. Hope and others*(e), explained this principle. In that case the plaintiff sued the commanding officer of a regiment and the other officers on a contract for clothing. First, a contract with the corps was set up; but the Court held there could be no such contract, as there was no such legal entity. The plaintiff then set up a contract with the colonel personally,

(d) *Wilson v. Tumman* (1843), 6 M. & G. 236.

(e) (1886), 3 Times Rep. p. 247, n.; *Hawke v. Cole* (1890), 62 L. T. 658.

and sued the officers as having ratified this second contract, although it was admitted that the original contract had not been made on their behalf. Lord Justice Brett held the colonel had never contracted personally, and said, "It escaped notice at this trial—notwithstanding the length of it, as it seems to me—that whichever of the two contracts was made with Colonel Durnford, the question of ratification could not arise; because if Colonel Durnford had made a contract binding himself personally, that was a contract which did not assume to be made on behalf of any one of the other defendants, and therefore whatever they said or did could not be a ratification. They could not ratify a contract which did not assume to be made on their behalf. They might have made a new contract; but the case put was that they ratified that contract. Now they could not do it" (f).

There must be an actual principal in existence at the time of making the contract to ratify.

Not only must the agent be professing to be acting as agent, but there must be an actual principal in existence; otherwise there can be no ratification. It was therefore held, that where a contract was signed by one professing to be signing as agent, but who had no principal in existence, he was liable himself on the contract, and that a stranger could not, by subsequent ratification, relieve him from his liability (g). The case in which this was decided was one in which a person was acting as promoter for a company that was intended to be got up, and "contracted on behalf of the company" on the 27th January; the company not being incorporated until the 20th February following. Chief Justice Erle, in giving judgment, said: "The cases referred to in the course of the argument fully bear out the proposition that where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby, and a stranger cannot by

(f) See, also, *Saunderson v. Griffiths* (1826), 5 B. & C. 909.

(g) *Kelner v. Baxter* (1867), 2 C. P. 174.

a subsequent ratification relieve him of the responsibility. When the company came afterwards into existence, it was a totally new creature, having rights and obligations from that time, but no rights and obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company which would become binding on it when subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is founded" (h). Lord Coleridge, in *Melhado v. Port Allegree Rail. Co.* (i), adopted this principle, and said: "*Kelner v. Baxter* is a distinct authority to show that the company could not ratify such a contract, as it was not in existence. It has, however, been decided that where a company has got all the benefits and advantages from the contract they will not be allowed to enjoy them without carrying out the arrangements and contracts of the promoter" (k). The contract must, however, be warranted by the terms of incorporation of the company (l).

Principal cannot take benefit of promoter's contract without carrying out his arrangements.

Mr. Justice Kay (in *Howard v. Patent Ivory Co.* (m), which is referred to with approval by Lord Justice Lindley in his book (n)) quotes Sir George Jessel's judgment in *The Empress Engineering Co.* (o), where he said: "The contract between the promoters and the so-called agent for the company, of course was not binding on the company by ratification: because it has been decided, and it appears to me well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because

(h) See, also, *In re Northumberland Avenue Hotel* (1886), 33 C. D. 16.

(i) (1874), 9 C. P. 503.

(k) *Edwards v. Grand Junction Rail. Co.* (1836), 1 M. & Cr. 650; see, also, cases quoted in Fry on Sp. Perf. 3rd ed. p. 110.

(l) *Caledonian, &c. Ry. v. The Magistrates of Hellenburgh* (1855), 2 M. Q. 391.

(m) (1888), 38 C. D. 156, at p. 164.

(n) Lindley on Companies, p. 177.

(o) (1881), 16 C. D. 128.

the ratifier was not then in existence." Mr. Justice Kay adds this: "It does not follow from that, that acts may not be done by the company after its formation which make a new contract to the same effect as the old one; but that stands on a different principle. That is to say, recognizing entirely the well-settled law that a company is bound by acts of part performance, and that when you find a company in possession of the property of another person you are bound, if you can, to refer that possession not to trespass, but to contract; and—as Turner, L. J., said (*p*), in the words I have quoted," [viz., that it would be a fraud if an individual kept possession of property of another person, and alleged there was no agreement, and therefore the Court ought to discover what the agreement was, and that it was the same in the case of a company] "to find out, if you possibly can, what that contract is. The Master of the Rolls excepts from his judgment, which he is giving, cases of the kind where there have been acts of a company from which you can infer, and from which you ought to infer, that there was a contract by the company after its formation." Mr. Justice Kay, therefore, in the case before him, holding the company had, in fact, adopted the promoters' contract, enforced it against the company.

Acquiescence. We have said ratification may be by acquiescence. If, for instance, the person is an agent, acquiescence will be presumed if the principal does not notify his repudiation of the act of the agent within a reasonable time after he is aware of what the agent has done. Thus, it has been held, in the case of the purchase of goods abroad, that where the agent told the principal what he had done in May, and the principal did not repudiate it until the August following, that was too late to do so (*q*). The principal has no right to pause and await the fluctuation of the

(*p*) *Wilson v. West Hartlepool Rail. Co.* (1853), 2 D. J. & S. 475. (*q*) *Prince v. Clark* (1823), 1 B. & C. 186.

market in order to ascertain whether the purchase or sale is likely to be beneficial or prejudicial.

If the agent has exceeded the price allowed to him, and the principal, although he knows it, accepts the goods and disposes of them as his own, he will be held to have ratified the act of his agent (*r*). If, however, having already advanced money on them, the principal for his own protection acts as factor for his own agent towards them, such a course of dealing does not amount to a ratification. Taking interest on money which an agent had lent without authority has been held evidence of ratification (*s*); and in another case, where the sale of goods was a fraud upon the seller, and he could have recovered them in an action of trover, he was held to have ratified the contract of sale by bringing an action for the price (*t*).

What acts amount to acquiescence.

Mr. Justice Story says that where an agency actually exists, mere acquiescence of the principal will give rise to the presumption of an intentional ratification of the act; but such acquiescence is far less cogent where no such relationship exists (*u*). In an action by a third party against the principal, one of the judges held that it would be very unsafe to say that, because there was a strong probability of the existence of a state of things from which a ratification might be inferred, a jury would be warranted in acting upon it as if there were strict legal proof; and the other judge thought, to establish a case of authority by ratification, there must be some substantial proof, and it must not rest upon probability or conjecture (*x*). In *Sentance v. Hawley* (*y*), which was an action by an agent against his principal for moneys paid on his behalf and for his benefit, the Court required only slight evidence of ratification, as the relation of principal and agent existed.

Acquiescence less cogent evidence of ratification where person not an agent.

(*r*) *Cornwall v. Wilson* (1750), 1 9 B. & C. 59.
Ves. 509.

(*s*) *Clarke v. Perrier* (1679), 2
Freem. 48.

(*t*) *Ferguson v. Carrington* (1829),

(*u*) Story on Agency, § 253.

(*x*) *Fitzgerald v. Dressler* (1860),
7 C. B. N. S. 374.

(*y*) (1863), 13 C. B. N. S. 458.

In that case certain goods had been paid for by the agent, in order to get the benefit of a discount for himself, before the payment was due. By this means the property in the goods, which were at a warehouse, became vested in the principal, and remained at his risk. A fire took place; the goods were burnt. The principal then refused to pay for the goods; but the Court held, that although the prepayment was without his instructions, yet as the principal had given the agent since the prepayment another order, and had not objected to the prepayment when giving such order, he had ratified the agent's act.

What
amounts to
ratification.

In *French v. Backhouse* (z), it was held a sufficient ratification by the principals that when told by their ship's husband that he had insured the ship they had not objected. In *Bigg v. Strong* (a), a son sold his own and his father's interest in a piece of land; the son usually acted as agent for his father, but had not been authorized to sell the land in question. In an action by the purchaser for specific performance, the Vice-Chancellor, in decreeing specific performance on the ground of ratification, said, "The plaintiff's right to specific performance must depend on his establishing a case of previous authority by the father to the son, or a subsequent recognition by the father. There is no sufficient evidence of previous authority; therefore the real question is, whether there was sufficient recognition by subsequent conduct of the father. It is clearly established that the father had full notice of the agreement, if not immediately, or on the same day, yet certainly within five days after it was signed. It cannot be considered that any express act on his part, such as signature of the agreement by himself, or any other solemnity by him after he became privy to the act done by his son on his behalf, was essentially necessary. Subject to his right to a reasonable opportunity

(z) (1771), 5 Bur. 2728.

(a) (1857), 3 Sm. & Gif. 592.

to express his dissent, every additional day and hour of silence after he became privy to the contract operates as a tacit acquiescence, and raises the presumption of assent. It cannot be said that tacit recognition is insufficient, for if in perfect silence he accepted the price to which he knew he was entitled according to the agreement, it could not be said that the assent and recognition were not sufficiently binding. On the other hand, had he silently refused to accept the price, it might have raised a presumption of dissent." In the case before him, it was arranged the purchase-money should be paid by forgiving a debt the father owed. In *Fothergill v. Phillips* (b), Lord Hatherley took a similar view, holding that an agreement for sale could not be objected to on the ground of non-concurrence, although the brother who sold both his and his brother's interest had not been authorized to make the sale, and did not usually act as his brother's agent. "As at present advised," Lord Hatherley said, "I am of opinion that it was the duty of John Phillips, if he dissented, to express his dissent as soon as he was informed of what his brother had done, and that if there were nothing more in the case he must have been taken to have ratified the agreement."

The cases of *Freeman v. Rosher* (c) and *Hilbery v. Hatton* (d) illustrate the kind of ratification the Courts require. In the first, a landlord was sued for trespass and conversion because his agent, the broker, in distraining had removed a fixture. The landlord had given no special instructions, and the evidence of ratification was merely receipt of the proceeds of the sale of the fixture in one sum with the proceeds of the distress. The Court held, that as the principal had no knowledge a trespass had been committed, and received the proceeds in the belief that the warrant had been lawfully executed, he was not liable as having ratified his agent's acts. In *Hilbery v.*

Where act of principal not necessarily an adoption of agent's act, no ratification.

(b) (1871), 6 Ch. Ap. 770.

(c) (1849), 13 Q. B. 789.

(d) (1864), 2 H. & C. 822.

Hatton, the agent in Africa bought a ship which was wrongfully sold; the principals in England adopted the act, though without any knowledge of the unlawful selling, by giving directions as to what he was to do with the hulk, and the principals were yet held liable for a conversion. In the first case, it was only the excess of authority that was unlawful, and the principal did not know of it; in the second, the act of the agent in intermeddling at all with a third party's property was *ab initio* wrong, and the principal by adopting it made himself responsible.

Company bound by acts of persons purporting to act for company with knowledge of directors.

A company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority, and a person dealing *bonâ fide* with such persons has a right to assume they are duly appointed (*e*). The shareholders of any company can ratify any contract which comes within the powers of the company in the memorandum of association (*f*).

Ratification must be of an act within principal's power.

A ratification is in law treated as an equivalent to a previous authority, and it follows that as a general rule a person or body of persons who are not competent to authorize an act cannot give it validity by ratifying it (*g*). It is competent for the majority of shareholders present at an extraordinary meeting convened for that object, and of which object due notice has been given, to ratify an act previously done by the directors in excess of their authority, but within the articles. But if the object of the meeting is to give the directors an extended authority beyond what is given by the articles, then that can only be done by a meeting held in accordance with the articles, at which the number provided thereby

(*e*) *Smith v. Hull Glass Co.* (1849), 8 C. B. 668; (1852), 11 C. B. 897.

(*f*) *Grant v. United Kingdom Switchback Rail. Co.* (1889), 40 Ch. Div. 135, *per* Lindley, L. J., at

pp. 139, 140.

(*g*) *Per* Sir Barnes Peacock in *Irvine v. Union Bank of Australia* (1877), 2 Ap. Cas. 366, at p. 374.

vote. The ratification of a particular act in excess of authority does not extend the power of the directors to do similar acts in future; for there is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future. Lord Justice Lindley (*h*) says, "A ratification to be imputable to a company must be made directly by the shareholders or indirectly through their agents acting within the limits of their real or apparent authority, and in order that the ratification by the shareholders or their agents may be proved it must be shown: (1) that the parties alleged to have ratified the contract knew what it was, or having had their attention drawn to it did not choose to inquire into it; (2) that they have in some way recognized it and adopted it" (*i*).

Ratification of one act does not authorize similar acts.

Ratification by company must be done by shareholders.

Two conditions of ratification.

In *Grant v. United Kingdom Switchback Railway Co.* (*k*), the shareholders ratified, at an ordinary general meeting, an agreement of the directors which was outside their authority, but within the objects of the company. It was contended that such a ratification amounted to an alteration of the articles, and could only be made by special resolution; but Lord Justice Bowen held it was not so, as the company did not purport to alter the limits of the authority given generally to the directors, and that there was nothing in them to prevent the company from giving special power to the directors in a particular case as to a particular contract; and that if the company adopted the agreement that was a ratification of an unauthorized act, and not an alteration of the articles.

It has been decided that for the purposes of the Statute of Frauds, the ratification of the principal relates back to the time when the agent made the contract (*l*), and need not

Ratification relates back to the making of the contract.

(*h*) Lindley on Companies, Cas. 111.
p. 177.

(*k*) (1889), 40 C. D. 135.

(*i*) See *Banque Jacques Cartier v. Banque d'Espagne* (1888), 13 Ap. Bing. 722.

(*l*) *Macleod v. Dunn* (1828), 4

be in writing. It is also so when the ratification is of the variation in the performance of one of the terms of the contract. Mr. Justice Blackburn said, "I cannot see why the assent to a substituted mode of performance of a contract need be in writing, and may not be by parol, though the original contract must have been in writing. They are quite different things—the proof of a substituted contract, and the proof of a ratification or approval after performance of the substituted mode of performance."

Onus probandi. If there is any dispute as to the position of the person alleged to be an agent, the third party must prove that the person purporting to act as agent was either so in fact or was held out as such. If it is a question whether the agent was authorized to affix the principal's name to a document, he must prove that the principal either authorized or assented to the agent's so doing (*m*).

An illegal act cannot be ratified.

The ratification to be good must be a ratification of what is lawful, not of something that is illegal. Lord Fitzgerald said, "Acquiescence and ratification must be founded on a full knowledge of the facts; and further, it must be in relation to a transaction which is valid in itself, and not illegal, and to which effect may be given as against the party by his acquiescence in the adoption of the transaction" (*n*).

Forgery.

There can be no ratification of an indictable offence, or an act contrary to public policy (*o*). It was therefore held by the Court of Exchequer, where a man had agreed to recognize a promissory note which had been forged as his own, that he could not by ratification make it his note (*p*). Chief Baron Kelly, in delivering the judgment of the majority of the Court, viz., Channell and Pigott, BB., Martin, B., dissenting, in *Brook v. Hook*, said:—"Many

(*m*) See Lord Selborne in *Mackenzie v. British Linen Co.* (1881), 6 Ap. Cas. at p. 82.

(*n*) *Banque Jacques Cartier v. La Banque d'Espagne* (1888), 13 Ap.

Cas. 111, at p. 118.

(*o*) Smith on Mercantile Law, 10th ed. Vol. I. p. 164.

(*p*) *Brook v. Hook* (1871), L. R. 6 Ex. 89.

cases have been cited to show that where one sued upon a bill or note has declared or admitted the signature is his own, and has thereby altered the condition of the holder, to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in the action upon the instrument. But here there was no such declaration or admission; on the contrary, the defendant distinctly declared and protested that his alleged signature was a forgery, and although in the paper signed by the defendant he describes the bill as bearing his signature and Jones', I am of opinion that the true effect of the paper, taken together with his previous conversation, is that the defendant declares to the plaintiff, 'If you forbear to prosecute Jones for the forgery of my signature, I admit and will be bound by the admission that the signature is mine.''' This question came up again in *Mackenzie v. British Linen Co.* (q) as to how far a forged instrument could be ratified. The forger there had had no business relations with the person whose name he forged. Lord Blackburn says:—"If I thought it were satisfactorily proved that Mackenzie, before Fraser uttered the bills with his name upon them, knew that Fraser was going to do so, and took no steps to hinder him, I should not have much hesitation in drawing the inference that he did authorize him. But even though it was not made out that the signatures were authorized originally, it still would be enough to make Mackenzie liable if, knowing that his name had been signed without authority, he ratified the unauthorized act. Then the maxim '*Omnis ratihabitio retrotrahitur et mandato priori equiparatur*' would apply. I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is

in the power of the person whose name was forged to ratify it, so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it." In the case before the House of Lords, it was not proved that the appellant whose name was forged knew of the existence of the bill sued on, and it appeared the bank had discounted the bill before the appellant could have told them that it was forged; the House of Lords therefore gave judgment for the appellant. The case of *Brook v. Hook* does not seem to have come before their lordships' notice, or been cited in argument. It is submitted, as the result of these two cases, that if a document is forged, and both the third party and the principal know it is, it cannot be ratified; but that if the principal by his conduct induces the third party to believe it is a genuine document, and the third party alters his position, the principal is civilly liable as having ratified the signature. See also *Freeman v. Cooke* (r).

It was contended before the Court of Appeal in another case, that a board of directors of a bank had by their conduct acquiesced in the appropriation of certain assets to the payment of a personal debt of its late manager; but the Court of Appeal held that such acquiescence, if it had existed, would have been illegal, and a breach of duty by the directors, and that under such circumstances no ratification was possible (s).

An act which if done by the principal, would be *ultra vires*, cannot be ratified.

It is also clear that when an act is altogether beyond the powers of the principal, it cannot be ratified (t), as where a company purported to assent to a contract which related to something altogether outside the memorandum of associa-

(r) (1848), 2 Ex. 654.

(s) *Banque Jacques Cartier v. La Banque d'Espagne*, *ubi supra*.

(t) *Ashbury Railway Carriage Co. v. Riche* (1874), L. R. 7 H. of L. 653.

tion (which defines the objects of the company), the Court held that, even if every member consented to such ratification, it was bad; for the twelfth section of the Companies Act of 1862 only allows companies to alter the memorandum for the purpose of increasing the capital, altering the division of shares, and similar objects. In the case of *The Ashbury Railway Carriage Company v. Riche*, the company, being constituted to make railway carriages, &c., purported to contract to supply the contractors with funds to build a railway abroad. Lord Cairns said, "The question is not as to the legality of the contract, but the question is as to the competency and power of a company to make the contract. Now I am clearly of opinion that this contract was entirely beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void from the beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder had said that is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing of the seal of the company, the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which by Act of Parliament they were prohibited from doing" (u).

The thing that the principal purports to ratify may either be a contract entered into by his agent or an act done by him. As we have seen, if it is a contract it must have been entered into on the principal's behalf, and be within his powers, and not be for an illegal purpose nor one contrary to public policy.

The ratification may be of (a) an act, (b) contract of the agents.

(u) See also *Irvine v. Union Bank of Australia* (1877), 2 Ap. Cas. 366, at p. 374.

Ratification
must be of the
whole trans-
action, and
not of part.

The principal can, however, only ratify the contract or the act of the agent wholly, and not in part, and he cannot adopt part and repudiate the rest. Lord Ellenborough (*x*): "If you adopt a man as your agent on your behalf you must adopt him throughout and take his agency *cum onere*." In *Bristow v. Whitmore* (*y*) the master of a ship without authority entered into a charter-party by which he was put to expense. The plaintiff wished to reap the profits of the charter-party without paying these expenses. Lord Cranworth, in giving judgment, said, "The principle which must, I think, govern this case is one of universal application, namely, that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthen. The contract must be performed in its integrity. Here the appellant, as agent for the owner, now represented by the respondents, stipulated for certain benefits in consideration of certain burthens which he undertook to bear and certain labours which he undertook to perform. If he had authority to enter into such a contract, the principal is of course bound. If he had not authority, then the principal may repudiate the contract; but he cannot take that part of it which is beneficial to him without performing that which is onerous."

Lawful act
cannot be
made un-
lawful by
ratification.

As to acts of the agent which are not contracts. It depends to a great extent what the nature of the act of the agent or the person purporting to act as agent is as to whether it can be ratified. Mr. Justice Story says, "If the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the non-performance of the act or duty, or would defeat a right or estate already vested in the latter, then subse-

(*x*) *Hovil v. Pack* (1806), 7 East, 161.

(*y*) (1861), 9 H. of L. 391, at p. 404.

quent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third person to the consequences." And the Editors of Smith's Commercial Law (z) lay down the rule that "An estate once vested cannot be divested, and an act lawful at the time of the performance cannot be rendered unlawful by the application of the doctrine of ratification."

There is a difference between the principal's right to adopt a contract and a bare act, the effect of which would be to raise a duty towards him from the third party, and subject that third party to damage for its non-performance. Such an act can never, if unauthorized at first, be confirmed by any recognition *ex post facto*. For instance, in an action for non-payment of goods, the plaintiff could not prove that he had ever demanded their payment, and it appeared that the only demand for payment which had been made was made by a clerk of the solicitor, who had not been authorized to make it by the plaintiff, but only by his master, the solicitor. The demand was held to be bad and the plaintiff non-suited, ratification not being possible (a). Similarly, in the case of a stoppage *in transitu* of goods a subsequent ratification was held bad (b). The *transitus* of goods ends when they have arrived at their destination, and when the person to whom they are consigned demands them, tendering the freight. In *Bird v. Brown*, unauthorized persons purported to stop the goods on the 4th May; on the 11th May the consignees demanded them, tendering the freight. On the 13th May the principal ratified the unauthorized stoppage, and it was held such ratification was too late, and could not alter the property of the goods, which had vested on the 11th May, when the consignees demanded the goods.

An act which if authorized would give rise to a duty cannot be ratified *ex post facto*.

In *Lord Audley's case* (c) a fine with a proclamation was

(z) Vol. I. p. 164.

(b) *Bird v. Brown* (1849), 4 Ex.

(a) *Coore v. Calloway* (1794), 1 Esp. 115.

786.

(c) Cro. Eliz. 561.

levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine. After the five years, but not before the party who had the right ratified and confirmed the act of the stranger, this was held to be inoperative, though such a ratification within five years would probably have been held to be good. So a notice to quit must be such as a tenant may act upon with safety, that is, one which is, in fact, binding on the landlord (*d*); and therefore, if an unauthorized person gives a notice to quit, the landlord cannot ratify it afterwards (*e*).

Ratification of such an act giving rise to a duty, good as between principal and agent.

Although the principal cannot ratify, as between himself and third parties, an act which if authorized would give rise to a duty, yet he may do so as between himself and the agent. For instance, where a person claimed rents from tenants on behalf of the real owner, and received them from the tenants, and the twelve years afterwards ran out in which the real owner could assert his title to the land, the agent was not allowed to set up the Prescription Act against the owner, and it was held that his acts as such agent, though unauthorized, might be ratified (as between himself and the owner) by the true owner, and that they were so ratified by the principal bringing his action within a reasonable time after he discovered his title. The accumulated rents and profits were also directed to be handed over by the agent, who was held to have made himself a trustee of them on behalf of the owner (*f*).

Ratification may be too late.

The ratification may be too late. Thus, in *Walter v. James*, an agent, without being authorized, paid a sum on behalf of the principal to the plaintiff Walter, to whom his principal owed money, and then, finding he was not authorized to pay it, received it back from him.

(*d*) *Jones v. Phipps* (1868), L. R. 3 Q. B. 567.

(*e*) But see *Right v. Cuthel* (1804), 5 East, 491; *Goodtitle v.*

Woodward (1820), 3 B. & Ald. 689.

(*f*) *Lyell v. Kennedy* (1889), 14 Ap. Cas. 437.

Walter then brought an action for it against the principal, who pleaded that his agent had already paid it. But the Court held that it was too late for him after the repayment to ratify or adopt the act of the agent (*g*).

But a person may ratify a contract of insurance after the loss had happened. This is an exception to the rule, and is explained by Chief Justice Cockburn as being so because the loss insured against is very likely to happen before ratification, and it is taken that the insurance so effected involves that possibility as the basis of the contract. Thus, it was held, where a policy of marine insurance was made by one person on behalf of another without authority, it might be ratified, after the loss of the thing insured, by the party on whose behalf it is made, though he knows of the loss at the time of ratification (*h*).

Contract of marine insurance may be ratified after loss.

The case of *Bolton v. Lambert* (*i*) is difficult to support on the ground of absolute justice. There the defendant made an offer to buy some sugar works to an authorized agent. The offer was accepted, though there was no authority to do so. The defendant then withdrew his offer, and it was not until some days after the offer had been withdrawn that the principal ratified the acceptance of his agent. It was contended for the defendant that this ratification was too late; but the Court of Appeal held it was not. Lord Justice Lindley, in his judgment, said: "The question is, what is the consequence of the withdrawal of the offer after acceptance by the assumed agent, but before the authority of the agent has been ratified? Is the withdrawal in time? It is said, on the one hand, that the ordinary principle of law applies, viz., that an offer may be withdrawn before acceptance. The proposition is, of course, true. But the question is—acceptance by whom? It is not a question whether a mere offer can be withdrawn,

Bolton v. Lambert.

(*g*) *Walter v. James* (1871), L. R. 6 Ex. 124.

(*h*) *Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757.
(*i*) (1889), 41 C. D. 295.

but the question is whether, when there has been in fact an acceptance which is in form an acceptance by the principal through his agent—though the person assuming to act as agent has not then been so authorized—there can or cannot be a withdrawal of the offer before ratification of the acceptance? I can find no authority in the books to warrant the contention that an offer made and in fact accepted by a principal, through an agent or otherwise, can be withdrawn. The true view, on the contrary, appears to be that the doctrine as to the retrospective action of ratification is applicable. If we look at Mr. Brice's (the counsel who argued for the defendant) arguments closely, it will be found to turn on this: that the acceptance was a nullity, and unless we are prepared to say that an acceptance of the agent's was absolutely a nullity, Mr. Brice's contention cannot be accepted. That the acceptance by the assumed agent cannot be treated as going for nothing, is apparent from *Walter v. James* (*k*). I see no reason to take the case out of the application of the general principle as to ratification." As to this, it is submitted that it seems inequitable that a person making an offer to a person he believes authorized, should be bound by such unauthorized person's acceptance, while the principal is not bound. It is submitted that the only effect of such an acceptance is to make the person giving it liable for breach of warrant of authority.

If the principal ratifies an act of the agent which is a tort, he makes himself liable for it (*l*).

If the agent is acting for a disclosed principal, the ratification of the contract by the principal will relieve the agent from all liability with respect to it (*m*). If the principal is undisclosed, ratification will not protect the agent from liability, but only give the third party an option as to

Ratification,
effect of, on
agent's lia-
bility.

(*k*) *Ubi supra*.

(*l*) *Hilbury v. Hutton* (1864), 2 H. & C. 822; *Freeman v. Rosher*

(1849), 13 Q. B. 780.

(*m*) *Spittle v. Lavender* (1821), 2 Brod. & Bing. 452.

whom he is to sue. Lord Cairns says, "I take it to be clear that where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts can sue the agent, or he may sue the principal" (*n*). (See "Liability of Agent to Third Party.")

If the act of an agent is a tort the agent is liable. It was therefore held that a clerk was liable for conversion, who had forwarded to his master goods to which the latter had no title; for a person is guilty of conversion who intermeddles with another person's property and disposes of it; and it is no answer that he acted under the authority of another who had no authority to dispose of it. And the Court is governed by principles of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of a master's right, that he shall be liable not only jointly with the master, but if the master cannot satisfy it, for every penny of the whole damage, and his person also shall be liable for it; and what is more, that he shall not recover contribution (*o*), for there is no contribution between joint tort feasers.

By the 2nd section of the Infants' Relief Act, 1874, it is enacted that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy or before any ratification made after full age of any provision or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. Ratification
by infant.

(*n*) *Kendall v. Hamilton*, 4 Ap. Cas. 504; 48 L. J. C. P. 704; 41 L. T. 418.

(*o*) *Per* Lord Ellenborough in *Stephens v. Elwell* (1815), 4 M. & S. 258.

CHAPTER VI.

THE AUTHORITY OF AN AGENT.

Agent's
authority—
as between
himself and
principal;
as between
principal and
third party;
as between
principal and
agent.

THE authority of an agent may be considered from two points of view. The authority which, as between himself and his principal, he is invested with, and the authority which, as between the third party and the principal, the principal will be estopped in denying that his agent possesses.

Let us first consider the agent's authority as between himself and his principal; in this case the amount of authority the agent has depends on the actual authority the principal has actually in fact given the agent. If we divide agents according to the authority given to them, there are three kinds of agents—universal agents, general agents, and particular agents. A universal agent is an agent for all purposes. Such an agency very seldom, if ever, exists; but very large powers are occasionally given to agents when the principal is about to go abroad and wishes someone at home to represent him. A general agent has rather more limited powers; he is usually a person to whom the principal has entrusted the management of a particular business, such as an estate agent. The third class of agent is a particular agent, *i.e.*, an agent sent to deliver a particular message or buy a particular thing on one occasion. As between the agent and principal, when a question arises as to whether the agent has exceeded his authority or not, the answer to it will depend on what was the authority actually given. If the agent is a universal agent, it is hardly possible to conceive that he could exceed his authority, though he might abuse it, and so be held liable for a breach of duty. If the agent is a general agent, the

test whether the authority has been exceeded, depends, first, on the construction of the particular document by which it was given if the authority is in writing, and next, on what in the ordinary course of business would be the authority of an agent in the particular employment. For instance, if a stockbroker were authorized to buy shares, and a question arose as to whether he had exceeded his authority, the first question would be, What were his instructions? and next, Did he act according to the custom of the Stock Exchange? for he would be held justified in acting according to the ordinary course of the Stock Exchange, unless he had been expressly forbidden to adopt a particular course (*a*); and an insurance agent would not, in the usual course of business, have authority to adjust a loss.

An agent must adhere strictly to the authority he has been given—thus, if he is employed by the holder of a bill to receive payment of it from the acceptor, he cannot receive payment clogged with a condition; and the agent cannot treat such conditional payment as absolute payment, and cancel the bill before he has received the principal's assent to the condition (*b*).

If a principal gives directions to his agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it was equally capable (*c*).

An authority must include all the means necessary to be used in order to accomplish the object of the authority. For instance, where the object of the authority is to settle the accounts of an executorship, it may include an authority to sue and to institute an action in Chancery (*d*). Thus an authority to sell a business would probably include

Ambiguity of authority.

Authority includes all necessary means of executing it.

(*a*) *Coles v. Bristowe* (1869), 4 Ch. Ap. 3.

(*b*) *Bank of Scotland v. Dominion Bank*, (1891) Ap. Cas. 592.

(*c*) *Ireland v. Livingston* (1871), 5 E. & L. Ap. 395, at p. 416.

(*d*) *Howard v. Baillie* (1796), 2 H. Bl. 628.

a power to sell it subject to a condition that the vendor would not commence a similar business (*d*).

Incidental powers.

Not only has an agent the authority which includes all the means necessary to be used in order to accomplish the authority, but there are always a certain number of incidental or minor powers which are attached to the general authority; as, for example, generally an agent authorized to sell has power to receive payment (*e*), though it is not so in the case of auctioneers, and *quare* whether it is so as to brokers (*f*). What these powers are must depend to a great extent on the nature of the agency and the circumstances; for instance, a farm bailiff has not, as such, authority to draw bills of exchange for his master (*g*).

What powers incidental: mixed question of law and fact.

It is a mixed question of law and fact what these powers are which is deduced from the particular business, employment, or character of the agents themselves. If an agent has authority to subscribe a policy, he may also adjust it (*h*), or refer it to arbitration (*i*). But the insurance broker is not the agent of the underwriter to pay a loss, and if he does so it is an officious payment, and he cannot recover it. "To bind one man by a payment made by another, there must either be a request before, or an assent afterwards; otherwise no man behind my back can make me his debtor" (*k*).

Authority interpreted by usages of trade.

The authority is construed to be given subject to the known usages of the trade or the business the subject-matter of the agency, and they become exponents of the implied powers of the agent; for instance, an authority to an insurance agent to insure includes an authority to refer the amount of the loss to arbitration, and to settle it generally, since that is the habit of insurance agents (*l*);

(*d*) *Hawkesley v. Outram*, (1892) 3 Ch. 359.

(*e*) *Capel v. Thornton* (1828), 3 Car. & P. 352.

(*f*) *Myyn v. Jolliffe* (1834), 1 M. & Rob. 326, *per* Littledale, J., p. 327.

(*g*) *Davidson v. Stanley* (1841), 2 M. & G. 721.

(*h*) *Richardson v. Anderson* (1805), 1 Camp. 42, note.

(*i*) *Goodson v. Brooke* (1815), 4 Camp. 163.

(*k*) *Per Buller, J., Bell v. Auldjo* (1784), 4 Doug. 48.

(*l*) *Goodson v. Brooke* (1815), 4 Camp. 163.

but an insurance broker cannot cancel a policy without express instructions. The third party, the insuring company, has a right to consider him as having authority to do all which a broker can do in discharge of his duty in effecting a policy, and they might safely settle with him in case of a loss if that be the ordinary mercantile usage: but there is no suggestion that it is part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into (*m*). It is an elementary proposition that a custom of trade may control the mode of performance of a contract but cannot change its intrinsic character. It may regulate as extrinsic what is done in the market where the contract does not provide otherwise. It cannot overrule what is agreed upon between the parties, whether intrinsic or extrinsic. The agent may perform the business he is engaged for according to the usages of the market in matters of detail, although the principal is not aware of such usage, because every authority to do a thing, not specifying the way, implies authority to do it in a reasonable way, which the usual way *primâ facie* is. But no usage unknown to the principal can justify a broker in converting himself into a principal seller (*n*). If the agent is a stockbroker the authority is construed as being subject to the rules and customs of the Stock Exchange and interpreted by them, so far as they are reasonable. It has been held a reasonable custom that a stockbroker should have a right to close his principal's account if the balance of differences in the broker's favour has not been paid him by the pay-day of the current settlement, provided the broker has given his principal notice of the amount of the balance before the pay-day (*o*). The custom that the jobber is only liable until he gives the names of persons who are unobjectionable and

Though custom controls mode of performance, does not alter character of contract.

Stock Exchange rules.

(*m*) *Xenos v. Wickham* (1867), L. R. 2 H. of L. 286, p. 321.

(*n*) *Per Willis and Keating, JJ.*, *Robinson v. Mollett* (1874), 5 C. P.

646, at p. 656; see also 7 C. B. 84; (1875) L. R. 7 E. & I. Ap. 812.

(*o*) *Davis & Co. v. Howard* (1890), 24 Q. B. D. 691.

capable of contracting (*p*), and the purchaser is liable to the third party (*q*), has been held to be good. The custom of the Stock Exchange also settles when the contract has been completed between the agent and third party, who therefore takes any incidental liability arising out of it (*r*).

Custom must
be reasonable.

The custom must, however, be a reasonable one. If it is an unreasonable one, such as to give the go-by to provisions of an Act of Parliament, the principal will not be bound by the custom. For example, on the Stock Exchange it is usual not to specify the numbers of the shares bought, although by *Leman's Act* (*s*) it is enacted that any contract for the sale of shares which does not specify the numbers of the shares shall be void. An agent who was a stockbroker tried to recover the price of shares he had paid for, the numbers of which were not specified, from his principal, and the Court of Appeal held that the custom of the Stock Exchange to recognize such contracts as valid was not reasonable and did not bind persons who did not know of it (*t*). If the principal knows, however, of an unreasonable custom, and contracts with his agent with reference to it, he may be bound by it (*u*); but the agent must prove, if he desires to bind his principal by a custom that has been declared unreasonable, or is so in fact, first, that the principal knew of the custom; and, secondly, that he consented to be bound by it (*v*).

Lord Cairns pointed out, in *Coles v. Bristowe*, that no private instructions given by a stockbroker can limit the general authority which, by employing him as broker on the Stock Exchange, the principal gives to sell according to the custom of the Exchange (*w*), and this principle applies

(*p*) *Nickalls v. Merry* (1874), 7 E. & I. Ap. 530; *Coles v. Bristowe* (1869), 4 Ch. Ap. 3, pp. 10, 11.

(*q*) *Loring v. Davis* (1886), 32 C. D. 625.

(*r*) *Coles v. Bristowe*, *ubi supra*; *Boering v. Shepherd* (1871), L. R. 6 Q. B. 309.

(*s*) 30 & 31 Vict. c. 29.

(*t*) *Perry v. Barnett* (1885), 15 Q. B. D. 388.

(*u*) *Seymour v. Bridge* (1885), 14 Q. B. D. 460.

(*v*) *Cooke v. Eshelby* (1887), 12 Ap. Cas. 271; *Blackburn v. Mason* (1893), 9 Times, 286.

(*w*) *Coles v. Bristowe*, *ubi supra*.

to all trade or business agencies ; and so true is the doctrine that the authority is subject to the ordinary usages of trade, that if the agent adheres to them, and loss is caused to the principal in consequence, he will not be liable (*x*).

But if the custom when applied would enable the broker or agent to earn his commission without making the contract he has agreed to, as when instead of buying for the principal on the market he sells his own goods to him, it will not be supported, for it would do away with the one thing that the agent is required to do, and would change the intrinsic character of the contract of employment, changing its nature altogether (*y*).

Custom cannot alter nature of contract between principal and agent.

When the authority is given by power of attorney it is construed strictly (*z*), that is to say, that when an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication (*a*). An authority to sell a business as a going concern probably gives a power to insert a clause in the contract restraining the vendor from carrying on business within a certain distance (*b*).

Authority given by power of attorney, how construed.

In construing general words in powers of attorney it must be remembered that they do not confer upon the agent powers at large, but only such powers as may be necessary, in addition to those previously specified, to carry into effect the declared purposes of the power of attorney (*c*) ; for these instruments only give the general powers necessary to carry the purposes of the special powers into effect ; for instance, a power of attorney to receive debts due does not authorize the agent to indorse

Construction of general words in a power of attorney.

(*x*) *Russell v. Hankey* (1794), 6 T. R. 12.

(*y*) *Robinson v. Mollett* (1874), 7 E. & I. Ap. 802.

(*z*) *Attwood v. Munnings* (1827), 7 B. & C. 278, at p. 283.

(*a*) *Bryant v. Banque du Peuple*,

(1893) Ap. Cas. 170.

(*b*) *Per Lindley, L. J., Hawksley v. Outram*, (1892) 3 Ch. 359, at p. 375.

(*c*) *Bryant v. Banque du Peuple*, (1893) Ap. Cas. 170 ; *Withington v. Herring* (1829), 5 Bing. 442.

and negotiate a bill (*c*) ; nor can he negotiate or indorse a bill when the power gives him authority to receive all salaries and money belonging to the principal (*d*). So also where a man had two businesses, one of which belonged entirely to him, and the other was a partnership business, it was held that a power of attorney which he gave to one of his partners to accept bills “for him and on his behalf” must be confined to accepting bills in those cases where it was right for the agent to accept them in the donor of the power’s individual capacity, *i. e.*, for the purpose of his private business. And it was held the power did not authorize the partner accepting bills for the joint business, for no power of attorney was requisite as to partnership transactions, for partners might bind the firm by their acceptance (*e*). In *Kilgour v. Finlyson* (*f*) an equally strict construction was put on an authority in writing which was contained in a notice of dissolution of partnership, the Court holding that the agent had not the authority to indorse a bill of exchange although the authority to the agent was as follows:—“All demands upon the above firm will be paid by Thomas Finlyson, of Bow Churchyard, who is empowered to receive and discharge all debts due to the said partnership.” A power of attorney in furtherance of partnership purposes does not extend to give a power to dissolve the partnership (*g*).

Custom cannot increase or vary authority given in power of attorney.

If either the agent or a third person relies on a power of attorney or a written document for showing that the principal has authorized the act, he cannot give evidence of custom to vary the written authority (*h*), the usages of trade being only admissible for the purpose of interpreting the powers (*i*). So a power to sell goods

(*c*) *Murray v. East India Co.* (1821), 5 B. & Ald. 204.

(*d*) *Hogg v. Snaith* (1808), 1 Taunt. 347.

(*e*) *Attwood v. Munnings* (1827), 7 B. & C. 278.

(*f*) (1789), 1 H. Bl. 156.

(*g*) *Harper v. Godsell* (1870), L. R. 5 Q. B. 422.

(*h*) *Hogg v. Snaith* (1808), 1 Taunt. 347.

(*i*) See *ante*, *Howard v. Baillie* (1796), 2 H. Bl. 618.

did not authorize the agent to barter (*k*) or pledge (*l*); and *a fortiori* not for his own debt when the third party has notice that the agent is not the owner (*n*).

But the agent's authority, although in writing, may have been either verbally or tacitly extended by the principal, and then, of course, the agent will not be limited to the four corners of the document, but be able to show that he had authority *aliunde* (*n*). For the maxim "*expressum facit cessare tacitum*," as applied to written authorities, only holds good when the whole authority grows out of the writing (*o*). This is only consistent with common sense, for if a man by his conduct leads third parties to believe that he has given his agent a larger authority than he has given him by a document in writing or actual words, it would be manifestly unfair for him to be able to avoid responsibility by asking it to be proved that the agent was given authority in writing or verbally to do the act.

Written authority may be extended verbally or tacitly.

As has been pointed out, the authority of an agent as between principal and third party is the authority which the principal held the agent out to have, or, in other words, the authority which the principal led the third party to think he gave the agent, *i.e.*, his apparent or ostensible authority. If a person was employed only once to buy an article, and he is not an agent by trade or occupation, the authority which the principal gave the agent, and that which the principal would be estopped by law from denying the agent had, are practically and to all purposes the same. If the agent exceeded his authority under such circumstances, the third party would only have a right of action against him for breach of warranty of authority, and has no remedy against the principal. But if the person who was employed to buy

Holding out of agent.

(*k*) *Guerreiro v. Peile* (1820), 3 B. & Ald. 616.

(*l*) *McCombie v. Davies* (1805), 7 East, 5; and see *Cole v. L. & N. W. Bank* (1875), L. R. 10 C. P. 354.

(*n*) *De Bouchout v. Goldsmid* (1800), 5 Ves. 210; see also *Kaltenbach v. Lewis* (1885), 10 Ap. Cas. 617.

(*n*) Story, § 79.

(*o*) Sect. 79.

was a stockbroker, a factor, or any kind of well-known agent, whose powers are well known, both by persons in business and those dealing with them, then, although the principal may have employed the broker, &c., as the case may be, only once, yet if he employed him in that capacity, the principal is estopped from denying that he had not the powers which such an agent in the like circumstances would usually have.

Authority of
wife.

The agent may, however, be in such a relation to the principal that if authority is given on one occasion, it may require very little evidence to raise a presumption that he or she is a general agent, and so estop the principal from denying the authority: for example, if the agent is in such a relation to the principal, as the relation of a wife to her husband. But it has been held that the fact that a wife lives with her husband does not alone entitle tradesmen to presume that the husband has given authority to pledge his credit so as to preclude him from denying it. And if the tradesman only knows that she is a married woman he must show that the husband either gave her authority to pledge his credit or had so acted as if he ostensibly or apparently gave her authority (*p*).

Authority of
agent, as
between prin-
cipal and
third party,
is his osten-
sible autho-
rity.

Hitherto we have been dealing with the extent and nature of an agent's authority principally as between himself and his principal. As between the principal and third parties the principal may be liable and bound much beyond what he actually authorized his agent to do, unless the third party knew of the limitation of the agent's authority. And though an agent will be liable to his principal for any act done outside or in breach of his authority (see chapter on Liability of Agent to Principal), yet the principal is liable to the third party who deals *bonâ fide* with the agent not knowing of the want of authority, not merely to the extent of the actual authority, but to the extent of the ostensible authority he allowed the agent to

assume, and which it was usual for an agent to have in the particular business (*g*); for example, if the servant of a private gentleman without authority warranted a horse, his master would not be bound (*r*); but if the servant of a horse-dealer warrants, although he has express instructions not to warrant, the master is bound; because the servant of a dealer having general authority to sell is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. In the latter case there is an ostensible authority to do that which is usual in the conduct of the business of a horse-dealer (*s*).

The principal is bound only if the agent does the act in the usual way or manner in which business is done, and not if he does it in an unusual manner; for instance, where the agent sold the stock upon credit instead of for ready money, the principal was held not bound to transfer (*t*).

Agent must perform agency in the usual way.

If an authority purports to be derived from a written instrument, and the agent executes his authority in writing and signs "*per procuration*," the other party dealing with the agent is bound to take notice that there is a written authority and to ascertain if the act is agreeable to the authority given (*u*). In *Smith v. McGuire* (*r*), Chief Baron Pollock, having adverted to the fact that judges' language is not generally to be taken as an accurate statement of the law, but is to be interpreted as applying to the particular case before them, held that the expression *per procuration* does not always necessarily mean that the act is done under procuration. All that it

What inquiry the words *per procuration* put a third party upon.

(*g*) *Withington v. Herring* (1829), 5 Bing. 442; *Fenn v. Harrison* (1790), 3 Term R. 757, at pp. 761, 762.

(*r*) *Brady v. Todd* (1861), 9 C. B. N. S. 592.

(*s*) *Howard v. Sheward* (1866), L. R. 2 C. P. 148.

(*t*) *Wiltshire v. Sims* (1808), 1

Camp. 257; *Hawtayne v. Bourne* (1841), 7 M. & W. 595.

(*u*) *Attwood v. Munnings* (1827), 7 B. & C. 278, p. 284. See also *Alexander v. Mackenzie* (1848), 6 C. B. 766, and *Stagg v. Elliott* (1862), 12 C. B. N. S. 373.

(*x*) (1859), 3 H. & N. 554.

in reality meant was, "I am an agent not having an authority of my own," and, speaking of commercial cases, and with reference to the inquiry it put the third party upon, the Chief Baron said: "I think that the holder of a bill is not bound to go to the acceptor and say, 'have you a power of attorney or other authority to accept this bill?' When he has ascertained that the person who accepted the bill as agent or by procuration is a clerk to the bearer, and in the course of his employment has from day to day accepted bills of that sort, that is enough, and he need not ask for his power of attorney or authority, nor whether the particular bill is on account of the firm." In the case before him, as the agent was a general mercantile agent, and was acting within the apparent scope of his authority, the Chief Baron held the principal was liable, although the agent had signed the charter-party "*per pro.*," and was, in fact, acting outside his actual authority.

Whenever the very act of the agent is authorized by the terms of the power—that is, whenever by comparing the act done by the agent with the words of the power the act is in itself warranted by the terms used—such act is binding on the principal as to all persons dealing in good faith with the agent, and such persons are not bound to inquire into the facts *aliunde*; the apparent authority is the real authority, so far as third persons are concerned, and where an agent abuses it it does not affect a person dealing *bonâ fide* with him (*y*).

Tests of
extent of
authority in
commercial
agency.

In cases of general agency, where there is no writing, or where the agent acts as a particular kind of mercantile agent, as a factor, the nature and extent of the authority usually depends entirely on the authority a person has usually in such a position; and, to ascertain whether the agent had authority, three tests should be applied: (1) was such authority actually given? (2) was

(*y*) *Bryant v. Banque du Peuple*, (1892) Ap. Cas. 170; *Montaignac v. Shitta* (1890), 15 Ap. Cas. 357.

it necessary that the agent should have the particular power (which is the subject-matter of inquiry) for the purpose of carrying out the agency, *i.e.*, must the power have been given by necessary implication? (3) was acting as the agent did usual in the ordinary course of business? Borrowing (*z*) and giving a promissory note as security for an advance have been held not within a general manager's authority (*a*); but the general manager of athletic sports was held entitled to pledge the committee's credit for things necessary for the sports, as tents, &c. (*b*).

In the case of factors, who are agents for the sale of goods, and which they have in their possession, certain powers are given them by Act of Parliament (*c*); and a third person dealing with them *bonâ fide* can deal with them when they have been in fact entrusted with goods by the owner with perfect security within the limits of such powers. These powers have been given them for the benefit of trade and the greater convenience of carrying it on. The authority may arise from mere employment in a particular business, such as an insurance agent or a factor.

Factor's
authority.

It must be remembered that in most cases, *i.e.*, where the authority of the particular class of agent has not been defined by custom, the authority of the agent depends on the intention of the parties when creating the agency; and the authority must be implied from facts which occurred during the agency, and not from arguments of general utility and convenience (*d*); for instance, the rules of clubs do not generally authorize the committee (which acts as agent for the members) to deal on credit and to pledge the credit of the members individually (*e*), although arguments of general convenience might be urged. The club

Authority
depends on
intention of
parties where
not fixed by
usage of
business.

(*z*) *Hawtayne v. Bourne* (1841), 7 M. & W. 595.

(*a*) *Re. Cunningham & Co.* (1887), 36 C. D. 532.

(*b*) *Pilot v. Craze* (1885), 52 J. P. 311.

(*c*) Factors Act, 1889 (52 & 53 Vict. c. 45).

(*d*) Story, § 87.

(*e*) *Fleming v. Hector* (1857), 2 M. & W. 172.

itself is not a legal entity known to the law (*f*). The authority of an agent may be gathered from the way he usually does his principal's business with his principal's assent; in other words, from the usual course of business as known or acquiesced in by the principal.

Whether the agent's exercise of the authority can be good as to part and bad as to part.

If the agent does not observe the authority, and goes outside it (and the principal does not happen to be estopped by having held out the agent as having the authority to do as he did), it depends upon whether the contract which has been made is entire or divisible; whether the exercise of any part of it which may be within the authority will be held good (*g*). Thus, where an insurance broker was authorized to underwrite for his principal up to 100*l.*, and he underwrote a ship for 150*l.*, the contract did not bind the principal even for 100*l.*

How principal may hold out agent as having authority.

The principal may hold out his agent as having authority to deal with goods either by intrusting a person, whose business it usually is to sell, with his property, or by placing it in a place where things are only sent for sale. Lord Ellenborough said, "Strangers can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's (who is a known agent) engagements are necessarily, and in all cases, confined to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind the principal within the limits of his authority, with which he has been apparently clothed by the principal, in respect of

(*f*) *Steele v. Gourley* (1886), 3 Times, 119, 772; *Crossman v. Granville Club* (1884), Law Times Newspaper, vol. 77, p. 84; *Hawke v. Cole* (1890), 62 L. T. 658.

(*g*) *Baines v. Ewing* (1866), 1 L. R. Ex. 320; 4 H. & C. 511; *Alexander v. Alexander* (1755), 2 Ves. sen. 640.

the subject-matter, and there would be no safety in mercantile transactions if he could not.

If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than of sale? Or, if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? When the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe" (*h*). Again, the very fact of intrusting goods to a man *as* a factor, with right to sell them, is *prima facie* authority from the principal to the factor to sell in his own name (*i*).

By sending goods to auction room, or by entrusting them to an agent whose business is selling.

Whenever the authority given to an agent is to transact business for the principal in a foreign country, it will be presumed, in the absence of evidence to the contrary, that it included authority to transact it in the form and manner required by the law of such country (*k*).

Authority to do business in foreign country.

This is the rule as laid down by Story and approved by Mr. Foote in his treatise on private international law. In support of it, he referred to Lord Lyndhurst's judgment in *Pattison v. Mills* (*l*), where he says: "If I, residing in England, send down my agent to Scotland and he makes contracts for me there, it is the same as if I myself went there and made them." This, Mr. Foote says, shows that the legal relations would be governed by the law of the foreign country (*m*).

Where the principal has by his conduct led third parties to believe that the agent had authority, he is,

When principal has held out agent as

(*h*) *Pickering v. Busk* (1812), 15 East, 38.

(*i*) *Ex p. Dixon, In re Henley* (1878), 4 C. D. 133, p. 133.

(*k*) § 86.

(*l*) (1828), 1 Dow. & Cl. at p.

342.

(*m*) 2nd ed. p. 448.

having authority, estopped from showing what real authority was.

on the principle of holding out, prevented from showing what the real authority was, as he has, by his action and conduct, misled third parties dealing with the agent. This principle applies also if the acts have been done by a stranger, if the principal's conduct has been such as to give rise to the reasonable belief that the acts were authorized by him (*n*). So it was held in a case (*o*) where goods belonging to the plaintiff were sold by the sheriff under an execution against somebody else, while the plaintiff stood by and made no objection, that it was a question that ought to be left to the jury whether he had not assented to the sale. Lord Esher said (*p*): "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such a belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented."

Principal may be estopped by standing by when stranger dealing with his property.

In another case, the House of Lords held that if a principal knows that a stranger is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, and so knowing, allows the stranger to expend money in that belief, the Court would not allow the principal to set up the want of authority in the agent. It must, however, be proved that the principal knew that the third party was thus acting (*q*).

Limited company cannot hold out agent as having authority beyond

In some cases, the contract being, as far as the principal is concerned, *ultra vires*, he cannot be estopped denying the authority. Thus, if the principal is a limited company (its powers being limited by the memorandum of association),

(*n*) Story, §§ 91 and 92.

(*o*) *Pickard v. Sears* (1837), 6 Ad. & El. 469; and see *Freeman v. Cooke* (1848), 2 Ex. 654; and *Mackenzie v. British Linen Co.*

(1851), 6 Ap. Cas. 82.

(*p*) *Carr v. L. & N. W. Rail. Co.* (1875), L. R. 10 C. P. at p. 317.

(*q*) *Ramsden v. Dyson* (1866), L. R. 1 H. of L. 129.

any contract made by an agent for it, as, for example, by a director of the company, upon a matter not included in the memorandum, is *ultra vires* of the company and is not binding on it (*r*). And such a company cannot hold out an agent as having authority to do something which it is itself not authorized to do (*s*). memorandum of association.

On the doctrine of holding out, the powers of directors of companies would be held to be much larger than they generally are in fact: if they were only limited by the purpose for which the company was formed; for they are general agents, and have implied authority to carry out the general business of the company in the usual way of business. It is, however, usual to limit these powers by the articles of association. If these articles are registered under the Companies Acts they are accessible to the public, and it has been settled that, under such circumstances, the company is only liable (apart from ratification) for the acts of the directors done within the powers given them by the regulations (*t*). Directors powers limited by articles of association.

By sect. 56 of the Conveyancing Act of 1881, it has been enacted that, "Where a solicitor produces a deed having, in the body thereof or indorsed thereon, a receipt for the consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt." This section is not retrospective. This was supposed always to be the law, but doubts arose about it owing to a dictum in *Vinay* v. Receipt in deed or indorsed, authority for payment to solicitor.

(*r*) *Ashbury Carriage Co. v. Riche* (1874), 7 E. & S. Ap. 653.

(*s*) *Chapleo v. Brunswick Permanent Building Society* (1881), 6 Q. B. D. 696.

(*t*) Lindley on Companies, 5th ed. p. 165; *Balfour v. Ernest* (1859), 5 C. B. N. S. 601; *Chapleo v. Brunswick Building Society* (1881), 8 Q. B. D. 696.

Chaplin (u). It has been decided that the solicitor producing the deed must be acting for the party to whom the money is expressed to be paid, *i. e.*, the person who signed the receipt therein, and he must produce the deed and not merely have it in his possession (*x*).

Act of agent must be done for principal's benefit, and within his authority, to make principal liable.

To bring an act within the implied authority of an agent, so as to make the principal liable, it must be done for the benefit of the principal and in the ordinary course of business (*y*). It was therefore held that as the ordinary business of a foreman porter who has general superintendence of a station-yard is not to protect and watch the property, he has no authority to order the arrest of a person whom he thinks stealing goods. He would have had a right to arrest a person disobeying a byelaw; and the person appointed to protect the goods would have authority to order the arrest of a person he thought stealing, so as to make the principal liable (*z*). The decision in *Edwards v. L. & N. W. Ry.*, it is submitted, would hardly be followed in a similar case, though the principle laid down may be right, as it surely is a servant's duty to protect his master's property and to arrest the person stealing if he could not otherwise protect it. He would not be justified in allowing someone to walk off with it. After the attempt to steal had ceased, and it was no longer necessary for the protection of the principal's property, there is clearly no authority.

Servant implied authority to do what is necessary for protection of master's property.

The implied authority is to do all things which are necessary for the protection of the property intrusted to the agent, or for the purpose of fulfilling the duty that he has to perform (*a*). For instance, where a company have, under a byelaw, a power to arrest a man if he does not pay his fare, the primary object of the byelaw is to enforce pay-

(u) (1858), 2 De G. & J. 468.

(x) *Day v. Woolwich Equitable Building Society* (1889), 40 C. D. 491.

(y) *Edwards v. L. & N. W. Ry.*

(1870), 5 C. P. 445.

(z) See also *Walker v. S. E. Rail. Co.* (1870), 5 C. P. 640.

(a) *Allen v. L. & S. W. Rail. Co.* (1871), L. R. 6 Q. B. 65.

ment of fares to the company and to protect their interest, and it has been rightly held that when a company leave a servant in charge of a station, he has no implied authority to decide whether the byelaw shall or shall not be enforced. But if the servant in charge of the station does an act in no way connected with the business of the company, there would be no implied authority for the act and the company would not be liable (*b*).

Sir Montague Smith, in the *Bank of New South Wales v. Owston* (*c*) (where criminal proceedings, which were held to be unnecessary, were instituted by an acting bank manager for the purpose of getting possession of a bill), thus summed up these decisions: "The result of the decisions in all these cases is, that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer unless he had the power to apprehend offenders on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal or had actually stolen it. In the latter of these cases, it is part of the supposition that the property might be got back by the arrest, but in such a case, the place and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority."

Authority of agent to arrest.

When are payments to the agent in law payments to the principal? The general rule of law was laid down by Lord Tenterden in *Russell v. Bangley*, as follows:—If a creditor employs an agent to receive money of a debtor and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes

Payment to authorized agent discharges third party, but not settlement in account.

(*b*) *Per* Blackburn, J., in *Allen v. L. & S. W. Rail. Co.*, *ubi supra*; see also *Poulton v. L. & S. W. Rail. Co.* (1867), L. R. 2 Q. B. 534.
(*c*) (1879), 4 Ap. Cas. 270.

Reason of
rule.

off money due from him to the debtor, then the latter is not discharged. An authority given by a principal to receive money cannot be construed into an authority not to receive money, but to allow the debtor (the third party) to write off so much as may be due from the agent to him: unless the principal expressly authorizes him to do so (*c*). The reason of the rule being that "if the agent receives the money in cash, the probability is that he will hand it over to the principal. But if he is allowed to receive it by means of a settlement of account between himself and the debtor, he might not be able to hand it over. At all events, it would very much diminish the chance of his principal ever receiving it; and upon that principle it has been held that the agent, as a general rule, cannot receive it in anything else but cash. Unless, therefore, there is a usage to control it, payment to the agent must be made in money" (*d*).

Custom can
alter rule if
reasonable.

The custom must, however, be a reasonable custom. Lord Esher held the custom on the London Stock Exchange unreasonable, by which a London stockbroker, who is employed directly by a country broker, has a right to treat the country broker as his principal, and to set off any claim against him when paying over the proceeds of shares; and pointed out that a principal can only be bound by an unreasonable custom when at the time of dealing the custom was made known to him, and he agreed to be bound by it (*e*).

Insurance
broker an
exception to
rule.

But "where an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and where the *known* general course of business is for the agent to keep a running account with the principal, and to credit him with

(*c*) *Bartlett v. Pentland* (1830), 10 B. & C. 760; *Underwood v. Nicholls* (1856), 17 C. B. 239.

(*d*) *Byles, J.*, in *Succeting v. Pearce* (1860), 7 C. B. N. S. 449, at p. 485;

see also (1861), 9 C. B. N. S. 534.

(*e*) *Blackburn v. Mason* (1893), 9 Times, 286; *Cooke v. Eshelby* (1887), 12 Ap. Cas. 271.

the sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with money received, the rule in those cases" (*i. e.*, *Bartlett v. Pentland and Underwood v. Nichols*) "cannot properly be applied; but it must be understood that where an account is *bonâ fide* settled according to the *known* usage, the original debtor is discharged, and the agent becomes the debtor according to the meaning and intention and with the authority of the principal" (*f*). In insurance business, the usual course of business is that "the broker is the debtor of the underwriter for the premiums, and the underwriter the debtor of the assured for loss. If the usage relied upon were to prevail, it would have the effect of making the broker (the agent), and not the underwriter, the debtor to the assured (the principal) for the loss. Such a usage, however, can only be binding on those who are acquainted with it and have consented to be bound by it" (*g*). Therefore the principal must be proved to have consented to his agent receiving payment by setting off accounts. This usage, as Lord Tenterden pointed out, would have the effect of making only the agent liable to the principal solely, and not the third party; but it has been decided both in Stock Exchange cases, where the different brokers *inter se* treat one another as principals, and in insurance cases, that the principal has a right to sue the real third party (*h*).

It has been decided in two cases (*i*), that payment by a bill of exchange is not a valid payment. In the latter of these cases (*Williams v. Evans*), Mr. Justice Blackburn says, "If the payment had been made by cheque; then it might be a question for the jury—since it is the custom to pay by

Payment by
bill of ex-
change not
valid pay-
ment.

(*f*) *Per* Lord Abinger in *Stewart v. Aberdeen* (1838), 4 M. & W. 211.

(*g*) Lord Tenterden in *Scott v. Irving* (1830), 1 B. & Ad. 605.

(*h*) See "Liability of Third Party."

(*i*) *Sykes v. Giles* (1839), 5 M. & W. 645; *Williams v. Evans* (1866), L. R. 1 Q. B. 352.

Validity of
payment by
cheque to
agent.

cheques—whether the payment would be good or not.” In *Thorold v. Smith* (*k*), where a payment was made in the city by a goldsmith’s note to a servant sent by his master to receive money, Holt, C. J., said “he thought it more a matter of evidence than of law, and any jury in Guildhall would find payment by a bill to be a good payment, it being the common practice in the city.” In *Bridges v. Garrett* (*l*), the question arose as to a cheque. The deputy steward of a manor, who had authority to receive payment of fines, was paid a fine and his own fees in a cheque crossed payable at his own bankers. His account happened to be overdrawn and the bank retained the amount of the cheque. It was contended that such payment was not good. C. J. Cockburn, in holding that it was good, said, “There is no doubt that where an agent is authorized to receive money for his principal, he cannot allow it to be set off in accounts between the payer and himself; he must receive it in money. If, however, payment is made by a cheque and the cheque is duly honoured, that is a payment in cash. There is nothing in the circumstance of a cheque being given which invalidates the payment; the present case, however, is a little complicated by the fact of the cheque having been crossed. It appears that the defendants, at Craig’s (the deputy steward’s) request, crossed the cheque with the names of Craig’s bankers. These bankers got the cheque cashed and carried the amount to the credit of Craig’s account with them. If Craig had not been overdrawn, he would have had the money. The cheque therefore was, in point of fact, money. It was the same thing as if the defendant had paid the amount to Craig in cash and Craig had paid in cash to his account with his bankers, and had forwarded his own cheque to the lord or to the steward and the bankers had, in consequence of the balance being against him, declined to honour his cheque. If Craig was authorized to receive the money, I think the

payment to him was a payment to the plaintiff, and that there was nothing to take the case out of the ordinary rule."

Mr. Justice Blackburn concurred in Chief Justice Cockburn's judgment, and pointed out that, though the general rule of law was that where a creditor's agent is bound to pay the whole amount over to the principal, he must receive it in cash from the debtor; and that a person who pays such agent, and who wishes to be safe, must see that the mode of payment enables the agent to perform that duty, yet that this rule only applied in its strictest sense to a clerk or servant *who has to hand over the money as he received it*.

It seems—provided there is a payment in fact, and not a mere setting off—that payment by cheque, whether crossed or not, is good. Mr. Justice Blackburn says: "Where the authority given is to receive the money, and then not to hand it over in specie, but to pay over an equivalent sum, the case is very different. If a servant intrusted with his master's money becomes bankrupt, the money would not belong to his creditors. But where an attorney or commercial agent is employed to receive money to be paid over to the principal the next day, it would, I think, in the event of the bankruptcy of the attorney or agent whilst the money remained in his hands, form part of his general assets." He therefore thought that there was a good payment of the fine, the deputy steward having the second kind of authority. It is just in cases of this second kind of authority that payment in money, for the reason given by Mr. Justice Byles, has been insisted upon (*m*).

In *Farrer v. Lacy* (*n*), an auctioneer took payment by cheque of a *deposit*. The cheque was afterwards dis- Payment of
deposit by
cheque good.

(*m*) *Russell v. Bangley* (1821), 4 B. & Ald. 395; *Bartlett v. Pentland* (1830), 10 B. & C. 760; *Scott v. Irving* (1830), 1 B. & Adol. 605.

(*n*) (1884), 25 C. D. 636; see also *Charles v. Blackwell* (1877), 2 C. P. D. 151, *per* C. J. Cockburn, at page 158.

honoured, but the Court held there was no negligence in him in taking a cheque for a *deposit*, but that it was a proper proceeding according to the usual practice of auctioneers. It is submitted, that if in all cases a cheque crossed to the agent's bankers were held payment, it might result in the mischief that the rule as to payment in cash was made to avoid, viz., that "the debtor might not be able to hand it over" (1); as the third party might wish the banker's overdraft to be paid, and so cross it to secure this effect.

Bridges v. Garrett
discussed.

Bridges v. Garrett (m) came before Mr. Justice Fry, in *Pearson v. Scott* (n), and while dealing with it he says: "The short effect of the decision of the Court of Exchequer Chamber is, that they thought there was evidence for the jury, and refused to disturb their finding. They thought, moreover, that, seeing that the cheque given by the surrenderee was good, and that it was an ordinary course of business to make payments by cheque, it might be considered that that cheque so given, when cashed, became a payment in cash to the agent."

In *Pape v. Westcott* (o), the principal sued the agent for negligence in taking a cheque in payment of arrears of rent from a tenant, and the Court of Appeal held he was entitled to recover. The facts were as follows:—A tenant held a house under a lease which had a proviso against assigning without the landlord's licence. The tenant wished to assign. The landlord directed the agent not to give the licence until the arrears of rent due were paid. The agent parted with the licence on receiving a cheque, which was subsequently dishonoured. The cheque was drawn in favour of the agent, and included a sum for his services. Lord Justice Lindley, after referring to sect. 202 of Story, where it is stated that a payment is good if

(1) See Byles, J., in *Sweeting v. Pearce* (1860), 7 C. B. N. S. 449, at p. 485.

(m) L. R. 5 C. P. 451.

(n) (1878), 9 C. D. 198.

(o) (1893), 10 Times, 51.

received in the usual manner of conducting similar business transactions, such as taking a cheque from a person in good credit, says: "I assume it to be the same if the agent receives money in a way in which it is ordinarily paid in this country, and a cheque is sometimes an ordinary way. I do not say a cheque is always a proper way of receiving money. Take the case of a solicitor entrusted with deeds of title for the purpose of carrying out a transaction of sale of real property: would a cheque in such a case be a proper mode of receiving payment on the sale? He might receive a cheque in payment of the deposit, but it would not be an ordinary mode of business if he were to accept a cheque for the purchase-money on completion, and part with the title-deeds before it was cashed; so that it cannot be said an agent is always justified in accepting payment by cheque from a person in good credit." Lord Justice Davey referred to the fact that the cheque was made payable to the agent, and included fees due to him, and held that there was no cheque ever given which belonged to the principal.

Where the principal has ordered something to be done, and he does not expressly forbid its being done in a particular way, if the agent does it in that way, it is held to be within the authority the principal gave him. Thus, where a principal employed an agent to get a bill discounted, and for the purpose of doing so the agent warranted it to be good, the principal was liable (*p*).

If principal does not limit agent as to method of exercising authority he may use his judgment.

A broker or agent employed to sell has *prima facie* no authority to receive payment otherwise than in money, according to the usual course of business, and it is equally clear that, if instead of paying money the third party writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to the agreement, though it may have been agreed to by the agent. Such an agreement amounts to no more

Broker must receive payment in money.

than the debtor seeking to discharge his debt to the principal by writing off a debt due to him by the agent, which he has no right to do (*g*).

Clerk in business *primâ facie* authority to receive payment.

Primâ facie where there is a place of business and a person conducting that business, such person has authority on behalf of the principal to accept a tender of money (*r*); but if he says he has no authority to receive it, the tender is bad (*s*); whether it is so if he simply says he has no instructions, is questionable (*t*).

Primâ facie house agent no authority to sign contract.

The mere fact of giving a house agent instructions to procure a purchaser for property, with a few details as to the nature of the property and the price, is not an authority authorizing him to sign a contract for the sale of the property (*u*).

Solicitor's authority in action.

"It is well established that the general authority to conduct a cause gives the attorney authority to compromise. The reason why the compromise is held to be binding upon the client is because the attorney is his general agent for that purpose. I think Lord Campbell said, in *Fray v. Voules* (*x*), 'An attorney retained to conduct a cause is entitled in the exercise of his discretion to enter into a compromise if he does so skilfully and *bonâ fide*; provided always that his client has given no express directions to the contrary; but where these directions have been given, such a step, though perhaps binding as between him and third parties, is *ultra vires* as between him and his client,' and he therefore held that an attorney who makes a compromise, in defiance of the express directions of his client not to do so, is guilty of a breach of duty. The other judges in that case held that it depended upon the contract in each particular case whether an attorney has authority to compromise, and decided against the attorney on the ground

(*g*) See also *Russell v. Bangle* (1821), 4 B. & Ald. 395; *Catterall v. Hindle* (1866), 2 C. P. 386.

(*r*) *Finch v. Boning* (1879), 4 C. P. D. 143.

(*s*) *Bingham v. Allport* (1833), 1

Nev. & M. 398.

(*t*) *Finch v. Boning*, *ubi supra*.

(*u*) *Hamer v. Sharp* (1875), 19 Eq. 108; *Chadburn v. Moore* (1892), 61 L. J. Ch. 674.

(*x*) (1839), 1 Ellis & Ellis, 839.

that he had been expressly forbidden to compromise, which would seem to imply that if there had not been an express prohibition, the compromise would have been a lawful act on his part" (y).

The client, and not the attorney, is *dominus litis*, and if the latter is prohibited from making a compromise and does so nevertheless, an action lies for breach of duty.

There is no implied authority in an agent to borrow money, except in the case of the master of a ship. In the case of the master, the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have a vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners: and therefore it is that the law invests the master with power to raise money, and by an instrument of hypothecation to pledge the ship, if necessary (z).

Power to
borrow.

An agent has no authority to pledge the goods of his principal at common law. And it was held that not even an agent for sale, who has authority to sell the goods out and out, had authority to pledge them; and that if he did so, his pledge was not good against the principal, even for the amount of any lien he had against his principal (a). It was found necessary for the purpose of business that factors should have powers of pledging goods, and powers have therefore been given to them under the Factors Acts enabling them to do so. These Acts have now been repealed and consolidated by the Factors Act, 1889 (52 & 53 Vict. c. 45).

Power to
pledge.

If an agent is, however, entrusted with negotiable instruments by his principal, as a sale in good faith of them is good against the principal, so a pledge of them is valid

Effect of
entrusting
agent with
negotiable
instruments.

(y) *Per Erle, C. J.*, in *Chown v. M. & W.* 595.
Parrott (1863), 14 C. B. N. S. 74. (a) *McCombie v. Davies* (1805), 7
 (z) *Hawtayne v. Bourne* (1841), 7 East, 5.

against the principal, and he cannot recover them without paying the amount for which they are pledged. It makes no difference that the third party knew that the agent was pledging his principal's securities: if he does not know that the authority was limited as to amount or that there was no authority (*b*).

Scrip.

In *Goodwin v. Roberts* (*c*), the principal employed a stockbroker to purchase foreign scrip, and left it after it had been purchased in the broker's hands to dispose of as he should hereafter direct. The broker fraudulently pledged the scrip for an advance to himself at his banker's. In an action of trover brought by the principal to recover the scrip from the bank, Lord Cairns, in finding for the bank, said: "The plaintiff bought in the market scrip which, from the form in which it was prepared, virtually represented that the paper would pass from hand to hand by delivery only, and that anyone who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign government. The plaintiff might have kept this scrip in his own possession, and if he had done so no question could have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent, and although it is stated that it remained in the agent's hands for disposal or to be exchanged for the bonds when issued as the plaintiff should direct, those into whose hands the scrip would come could know nothing of the plaintiff's title or of any private instructions he might have given to his agent. The scrip itself would be a representation to anyone taking it—a representation that the plaintiff must be taken to have made or have been a party to—that if the scrip were taken in good faith and for value the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed for the moment that the instrument was not negotiable,

(*b*) *London Stock Bank v. Simmons*,
(1892) A. C. 201; see Lord Her-

schell's judgment at pp. 216, 217.
(*c*) (1876), 1 Ap. Cas. 476.

and that no right of action was transferred by delivery, still the plaintiff is in the position of a person who has made a representation on the face of his scrip that it would pass with a good title to anyone on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. I am of opinion that on doctrines well established the plaintiff cannot be allowed to defeat the title which the defendants have acquired."

If the third party, however, knows that the securities are not the agent's, and that from the nature of the business—as that of a money-lender—they are only given to secure advances, then the third party can only hold them for the amount of the advance for which the agent received them (*c*).

Money-lender entrusted with client's securities.

It has, however, been decided that where a stockbroker's transactions with his client are on "contango," he has a right to pledge the stock, for the stocks are not the client's, but the broker's. The client's right is only to insist on the broker re-selling him, not the same, but similar, stock (*d*).

"Contango."

Finally, there may be an authority to be exercised only in an emergency, and derived from the exigency of the occasion; such an authority is a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show commonly that the agent was acting in what he did on behalf of the principal, but in the case of such a limited authority, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision, and that question raises

Authority for emergency or necessity.

(*c*) *Sheffield (Earl of) v. London Joint Stock Bank* (1888), 13 Ap. Cas. 333; and see *Foster v. Pearson* (1834), 1 C. M. & R. 849.

(*d*) *Bentinck v. London Joint Stock Bank*, (1893) 2 Ch. 120; 68 L. T. N. S. 315.

issues beyond the mere fact that the agent acted on behalf of, and in the supposed interest of the principal. Were it otherwise, the special authority would be equivalent to a general one (*e*).

We will now deal with the authority of particular kinds of agents.

Auctioneers.

Auctioneer's
authority.

An auctioneer has authority to sue the third party (*f*). Lord Loughborough said, "An auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody, as a servant. There is no difference whether the sale be on the premises of the owner or in a public auction room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him, with a lien for the charges of the sale and commission and the auction duty, which he is bound to pay. In the common course of auctions there is no delivery without actual payment; if it be otherwise, the auctioneer gives credit to the vendee entirely at his own risk;" and Mr. Justice Heath, in the same case, said, "though he is an agent for some purposes, he is not so in all. He is an agent for each party in different things, but not in the same thing; when he prescribes the rules of bidding and the terms of sale, he is agent for the seller; but when he puts down the name of the buyer, he is agent for him only."

Whose agent.

Auctioneer's
authority to
warrant.

An auctioneer has no authority to warrant anything he sells at a sale, and if he does so, he will be liable personally (*g*).

(*e*) *Per* Montague Smith, *Bank of New South Wales v. Owston* (1879), 4 Ap. Cas. 270, at p. 291.
(*f*) *Williams v. Millington* (1788),

1 H. Bl. 80; see also *Robinson v. Rutter* (1855), 4 El. & Bl. 954.
(*g*) *Payne v. Leconfield* (1882), 51 L. J. Q. B. 642.

The extent of the authority of an auctioneer, in the absence of any proof of general authority, must depend upon the conditions of sale (*h*). The moment after the sale the auctioneer is no longer the agent for sale of the owner of the goods. He has no authority to make any arrangement for the payment of the remainder of the purchase-money after he has received the deposit. The extent of his authority, in the absence of proof of general authority, depends upon the conditions of sale. The principal is not liable for his statements after the sale (*i*). The result of this is, that he cannot sign a memorandum to satisfy the 17th section of the Statute of Frauds so as to bind the purchaser after the auction.

Authority depends on conditions of sale.

If the sale takes place after the auction is over, it must be treated as any ordinary sale, and no custom of trade will avail to get out of the statute; for although there is no doubt that an auctioneer at the sale is agent for both seller and buyer, the moment the sale is over the same principle does not apply, and the auctioneer is no longer the agent of both parties but of the seller only, and the signature of the seller or his agent cannot bind the buyer (*k*). Though the auctioneer at the sale is the agent of both seller and buyer, so as to bind them by his signature, if he brings an action himself he cannot rely on the entry by himself or his clerk in the book which is usually kept by auctioneers as a sufficient memorandum to bind the purchaser within the Statute of Frauds, for the signature must be of some third person and not of the person suing (*l*).

Ceases to be agent for buyer after sale.

If the memorandum by the auctioneer does not state the sale was by sample when it was in fact so, it omits a material term in the contract, and is not a good memo-

(*h*) *Sykes v. Giles* (1839), 5 M. & W. 645.

(*i*) *Brett v. Clowser* (1880), 5 C. P. D. 376; and see *Sykes v. Giles*, *ubi supra*.

(*k*) *Per C. B. Pollock in Mews v. Carr* (1856), 1 H. & N. 484.

(*l*) *Farebrother v. Simmons* (1822), 5 B. & Ald. 333; *Wright v. Dannah* (1813), 3 Camp. 283.

randum within the Statute of Frauds (*m*). Lord Eldon, speaking of an auctioneer, says, "He was an agent only to sell, not to deal with the terms upon which a title was to be made. If any authority for anything subsequent to that is set up, it must be proved" (*n*). If the auctioneer sells without disclosing his principal's name at the time of sale, although he only sells "as auctioneer," he is personally liable (*o*), although it is plain he acts as agent only.

Authority to
protect goods
from distress.

An auctioneer is justified in protecting the goods he has to sell from distress by paying it out; but if he has sold them, and the property has passed to the purchasers, he has no authority to do so; for, as we have seen, after the sale he is agent solely for the seller and has no authority, either express or implied, from the buyer (*p*).

After sale no
authority to
protect goods
from distress.

After the fall of the hammer the property in goods passes to the purchaser subject to the vendor's lien, the auctioneer has therefore no authority to do anything to protect them on behalf of the vendor. Thus, it was held that, after the sale, the auctioneer had no authority to promise on behalf of the tenant, the vendor, that the rent would be paid out of the proceeds of the sale. Mr. Justice Blackburn, in giving judgment, said, "I may observe that if the threat to distrain had been uttered before the sale, I should be very much inclined to think that the auctioneer would have been acting within his authority in making such a contract, to prevent the loss which the distress would have caused to his client; but as it happened after the sale, I am of opinion that he had no such authority at all."

Effect of ad-
vertisement.

If an auctioneer advertises in good faith the sale of property and then does not sell it, he is not liable to an

(*m*) *McMullan v. Helby* (1879), L. R. Ir. 6 Q. B. D. 463.

(*n*) *Per* Lord Eldon in *Seton v. Slade* (1802), 7 Ves. 264, at p. 276. See, also, *Hanson v. Roberdean* (1792), Peake, 163; and, as to the

effect of signing "as agent," *Gadd v. Houghton* (1876), 1 Ex. Div. 357.

(*o*) *Franklyn v. Lamond* (1847), 4 C. B. 637, at p. 644.

(*p*) *Sweeting v. Turner* (1872), L. R. 7 Q. B. 310.

action by some one who has gone to expense in attending the proposed sale. The advertisement is only a declaration of intention and affords no ground of action (*q*), the Court holding that the statement that he was liable under such circumstances was a proposition entirely destitute of authority, and that it would be introducing a very inconvenient rule of law to say that an auctioneer is bound to give notice of the withdrawal, or to be held liable to everybody attending the sale. It was impossible to say that there was a contract with everybody attending the sale, and that the auctioneer is to be liable for their expenses if any single article is withdrawn. If the auctioneer announced that the sale is to be without reserve, the highest *bonâ fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve; for the auctioneer who puts up property for sale upon such a condition pledges himself that the sale shall be without reserve, or, in other words, contracts that it shall be so, and that this contract is made with the highest *bonâ fide* bidder, and in case of breach of it he has a right of action against the auctioneer (*r*).

The owner may at any time before the contract is legally completed interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified (*s*).

Revocation of
auctioneer's
authority.

It is stated in all works on Principal and Agent that an auctioneer has no right to sell by private contract. This seems to be so, but the cases cited in support of it in Evans on Principal and Agent (*t*), and by Bateman on Auctions, do not seem to be authorities in point (*u*). The head-note

Query authority
to sell by
private treaty.

(*q*) *Harris v. Nickerson* (1873),
L. R. 8 Q. B. 286.

(*r*) *Warlow v. Harrison* (1858), 1
E. & E. 295, at pp. 316, 317.

(*s*) *Warlow v. Harrison*, *ubi*
supra.

(*t*) Evans on Principal and
Agent, 2nd ed., p. 144.

(*u*) *Wilkes v. Ellis* (1795), 2 H.
Bl. 555; and *Marsh v. Jelf* (1862),
3 F. & F. 234.

to *Marsh v. Jelf* is to the following effect:—"On an employment of an auctioneer to sell by auction, there is no employment to sell by private contract if the public sale proves abortive, and evidence of a custom to that effect among auctioneers is inadmissible." An auctioneer has no authority to rescind a contract after the sale; if he thus deviates from the usual course of his business he will have to show that he had authority (x).

Cannot
delegate
authority.

Coles v. Trecothick (y) is cited in all the books as an authority showing that an auctioneer cannot delegate his authority, even to one of his clerks.

Brokers.

Broker, defi-
nition of.

A broker is an agent employed to make a bargain for another, and receives a commission on the transaction, which is usually called brokerage, for so doing (z). A broker is distinguished from an auctioneer by the fact that his business is not only to sell but also to buy. A broker has neither the custody nor the possession of the goods (a).

Broker is
like auc-
tioneer, agent
for both
parties.

Brokers are usually employed by both buyer and seller —by the seller to sell and by the buyer to buy for him, and the terms are arranged by them as the common agents of both parties. Story points out, however (b), that primarily a broker is deemed merely the agent of the party by whom he was originally employed; and he becomes the agent of the other party only when the bargain is definitely settled as to terms by the principals; his agency for the other party being of the same nature as the auctioneer's, merely to fix the contract once made in writing, and put its terms in writing for the purposes of the Statute of Frauds.

(x) *Nelson v. Aldridge* (1818), 2 Stark, 435.

(y) (1804), 9 Ves. 234.

(z) *Per C. J. Tindal in Pott v.*

Turner (1830), 6 Bing. 702.

(a) *Baring v. Corrie* (1818), 2 B. & Ald. 137.

(b) § 31.

And it would be a fraud, as Story shows, in a broker to act for both parties, concealing his agency for one from the other, in a case where he was intrusted by both with discretion as to buying and selling, and where his judgment was relied on.

Broker cannot act for both parties if given discretion.

Brokers have authority to sign bought and sold notes, and such signature is a sufficient memorandum of the bargain to satisfy the requirements of the Statute of Frauds (*c*).

Authority to sign memorandum of contract.

Although the broker is agent for both parties, and as such may bind them if he signs an identical contract on behalf of buyer and seller, yet if he does not sign the *same* contract, *i.e.*, if the "bought" and "sold" notes do not agree, neither party is bound. It has been decided accordingly, that where the broker delivers a different note of the contract to each of the contracting parties, there is no valid contract. The entry in the broker's book is, properly speaking, the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of the entry in the broker's book. A valid contract may probably be made by perfect notes signed by the broker and delivered to the parties, although the book be not signed, but if the notes are imperfect, an unsigned entry in the book will not supply the defect. It is the duty of the broker to make the contract so as to be binding on both parties (*d*). In *Thompson v. Gardiner* (*c*), a broker, acting for the plaintiff, made a contract for a sale of goods to the defendant and sent a note to each party, but only signed that which he sent to the seller (the plaintiff). He, however, entered the contract in his book, in which he signed both bought and sold notes. The defendant kept the note which was sent without objection until he was called upon to accept the goods. He then repudiated the contract on the ground that the note sent to him was not

Must sign an identical contract for both.

(*c*) *Parson v. Crofts* (1855), 16 C. B. N. S. 11; and *Chapman v. Partridge* (1805), 5 Esp. 256.

(*d*) *Grant v. Fletcher* (1826), 5 B. & C. 436.

(*e*) (1876), 1 C. P. D. 777.

signed. The Court, however, held that the fact that the defendant had kept the note amounted to an admission that the broker had authority to make the contract for him, and the signature of the broker to the sold note therefore bound him. A signed memorandum in the broker's book of the bargain is sufficient to satisfy the Statute of Frauds (*f*).

Broker may not sell in his own name ;

unless there is a custom to do so.

The employment of an agent as a broker does not authorize him to sell in his own name. If, therefore, the agent sells in his own name, he acts beyond the scope of his authority, and the principal is not bound (*g*). It has been, however, held that a broker need not sell in his principal's name where it is proved that there is a usage the other way, as, for instance, in the wool trade in Liverpool, where a broker employed to buy wool may either contract in the name of his principal, or may, at the request of the seller (without communicating the fact to his principal) make himself personally responsible for the price by contracting in his own name (*h*).

Insurance broker.

An insurance broker may also effect a policy in his own name. This is enacted by a statute of 28 Geo. III. c. 56, and was decided by Lord Kenyon in *De Vignier v. Swanston* (*i*), where the defendants objected that the plaintiffs had no cause of action, because it was not stated that the policy was taken out as agent, and Lord Kenyon held there was nothing in the objection. There is also a similar usage on the Stock Exchange, where the contracts are made in the stockbroker's own name until the name day, when they have either to take the stock or shares, as the case may be, or give the name of their client. The members of the Stock Exchange deal among themselves always as principals.

(*f*) *Thompson v. Gardiner*, *ubi supra*.

(*g*) *Per Albott, C.J.*, at p. 142; and *per Holroyd, J.*, in *Baring v. Corrie* (1818), 2 B. & Ald. 137, at p. 148.

(*h*) *Cropper v. Cook* (1868), 3 C. P. 194.

(*i*) (1798), 1 Bos. & Pul. 346, note (6).

A principal employs a broker from the opinion he entertains of his personal skill and integrity, and a broker has no right without notice to turn his principal over to another of whom he knows nothing (*j*). If the broker does so, there is no privity of contract between the sub-broker and the principal, unless there is a usage of trade authorizing the broker to put the goods of his employer into the hands of a sub-broker to sell and to divide the commission.

Broker cannot delegate his authority.

It frequently happens that the same person does business as factor and as broker, and he may in one transaction be acting as broker, and in another be selling as factor. This is most frequent in the case of brokers of goods, or merchandize brokers, such as wool, corn, cotton, &c.; and in ascertaining the rights of the parties, one has first to ascertain in what capacity the particular business was undertaken. The various brokers who are mentioned by Story are shipbrokers, exchange and money brokers, stockbrokers, merchandize brokers, insurance brokers.

A broker can sell on credit if that is the usual manner; but it is not usual for a stockbroker to take a promissory note, and therefore the principal will not be bound (*k*).

Broker can sell on credit if custom of the trade.

It is not the duty of the broker, unless there are words importing he has to perform such a duty, to see to the delivery of the goods or the payment of the price; but it may be the duty of the broker, under the employment he undertakes, to see to the delivery of the goods, and to take care that the price is paid (*l*).

Payment and delivery.

Lord Denman, in *Boorman v. Brown*, as reported in the Queen's Bench Reports (*m*), held that it was not part of the duty of the broker to keep the goods consigned until paid for. In most cases, as the broker only makes the

(*j*) *Per* Lord Ellenborough in *Cockran v. Irlam* (1814), 2 M. & Sel. 300.

(*k*) *Wiltshire v. Sims* (1808), 1 Camp. 257.

(*l*) *Per* Lord Campbell in *Boorman v. Brown* (1844), 11 Cl. & Fin. 1, at p. 44.

(*m*) (1844), 3 Q. B. at p. 515.

bargain, and the principal has the goods, it is the principal's own fault if he hands over the goods before they are paid for. It seems to depend on the custom of the particular trade whether a broker is authorized to receive payment (*n*), but he has clearly no power to vary the terms of payment (*o*). Lord Ellenborough, in *Coates v. Lewis* (*p*), held, "a broker after having made a contract of sale cannot vary the terms of it to the disadvantage of his principal." A shipbroker ought to make the freight payable according to the ordinary mercantile usage to the owners, and if he, in breach of that duty, enters into a charter-party by which he reserves payment to himself, it is a fraudulent act, and he will be accountable to the persons who have sustained loss through his misconduct (*q*).

When principal misrepresents facts to broker, latter has right to rescind contract.

Person employing stockbroker authorizes his acting according to rules of Stock Exchange.

If the principal employs the broker to sell what is represented to be good stock, and it turns out to be worthless, the broker has a right to rescind the contract he has made with the third party, and repay him his money. When the principal employs a broker he gives him implied authority to act as all brokers do; that is, to rescind a contract if the article turns out not to be the article that it was represented to be (*r*). A person employing one who is notoriously a stockbroker must be taken to authorize his acting in obedience to the rules of the Stock Exchange, or, if he is not a stockbroker, as other brokers; but a broker in another kind of business, to give him authority to act as other brokers in such business do act. It does not matter whether he himself is acquainted with the rules by which brokers are governed (*s*); and so, if the principal by mistake tells his broker to sell 250 shares

(*n*) See *Mynn v. Joliffe* (1834), 1 M. & Rob. 326; *Jackson v. Jacob* (1837), 5 Scott, 79, at p. 86; *Campbell v. Hassell* (1816), 1 Starkie, 233.

(*o*) *Campbell v. Hassell*, *ubi supra*.
(*p*) (1808), 1 Camp. 444.

(*q*) *Walshe v. Provan* (1853), 8 Ex. 843, at p. 851.

(*r*) *Young v. Cole* (1837), 4 Scott, 489, at p. 497.

(*s*) *Sutton v. Tatham* (1839), 10 A. & E. 27.

instead of fifty, and in consequence the broker contracts to sell the whole number, and is unable to carry the contract out, and has to pay the difference of price which the other broker to whom he contracted to sell them has had to pay in procuring them elsewhere, the principal must indemnify his broker (*t*). But the custom must be a reasonable one, not such as to give the go-bye to a statute: see *Bowring v. Shepherd* (*u*).

A broker has authority to carry out the order with reference to the state of the market, and if that does not allow him to carry out the order of his principal exactly, he has authority to do the next best for him (*x*).

A broker cannot sue in his own name upon a contract made by him as broker. Chief Baron Kelly said: "The numerous cases cited to us show that in certain contracts the agent may himself sue as principal; but in none does it appear that a broker has successfully maintained an action on a contract made by him as broker. He may, no doubt, frame a contract in such a way as to make himself a party to it and entitled to sue; but when he contracts in the ordinary form, describing and signing himself as broker and naming his principal, no action is maintainable by him" (*y*).

A bill broker is an agent to procure the loan of money on customers' bills. It is his business to procure the loan on each person's bill separately. If there is a custom to raise money by pledging the bills of different proprietors for one entire advance, there is nothing unreasonable in such a practice. Though, on the one hand, it is attended with inconvenience, because one person may have to answer for the non-payment of another's bill, yet, on the other hand, it gives facilities to the raising of money on nego-

Broker must act with reference to the market.

Cannot sue in his own name.

Bill broker, definition of.

(*t*) *Sutton v. Tatham*, *ubi supra*.

(*u*) (1871), L. R. 6 Q. B. 309.

(*x*) *Ireland v. Livingston* (1871), 5 E. & I. Ap. 395; *Johnston v.*

Kershaw (1867), L. R. 2 Ex. 82.

(*y*) *Fairlie v. Fenton* (1870), L. R. 5 Ex. 169.

Cannot
pledge client's
securities for
his own
purposes.

liable paper; for a large capitalist would advance money in that way, but would not discount each particular bill (z). *Prima facie*, he has no right to deposit the bills of his principal as security for an antecedent debt of his own, unless he can prove a custom to that effect (a), and unless the principal knows of the custom and assents to it.

Factors.

Factors—

buy and sell
in their own
names;

Factors are agents who are put in possession of goods or the documents of title to them, and are employed to sell or purchase them on commission, but not to barter them (b). Where, for an extra commission, they guarantee the payment by the purchaser, they act under a *del credere* commission. Factors, as distinguished from brokers, buy and sell in their own names, and are intrusted with the possession, management, and control of goods (c). A factor is called a home factor when he resides in the same country as his principal; when he resides in a different country, he is a foreign factor. If the cargo of a ship is consigned for sale to a person who travels with it, he is called a supercargo.

may sell on
credit.

There is no doubt of the authority of a factor to sell upon credit, though not particularly authorized by the terms of his employment (d). The purchaser of goods from a factor has a right to pay him in money and be discharged (e). And as a factor is an agent employed out of reliance in his personal skill and integrity, he cannot hand over his duties to another (f); nor does he appear to have authority to compound a debt (g). Factors have an

(z) *Foster v. Pearson* (1834), 1 C. M. & R. 849.

(a) *Haynes v. Foster* (1833), 2 C. & M. 237; and see also *Foster v. Pearson*, *ubi supra*.

(b) *Guerreiro v. Peile* (1820), 3 B. & Ald. 616.

(c) *Baring v. Corrie* (1818), 2 B. & Ald. 148; *Johnson v. Usborne* (1841), 11 Ad. & E. 549.

(d) *Per Chambre, J.*, in *Houghton v. Mathews* (1803), 3 Bos. & Pal. 485.

(e) *Per Lord Mansfield* in *Drinkwater v. Goodwin* (1775), Cowp. 251.

(f) *Cockran v. Irlam* (1814), 2 M. & Sel. 300.

(g) *Howard v. Chapman* (1831), 4 C. & P. 508.

insurable interest in the goods confided to them, and can recover in respect of an insurance effected by them (*h*).

Factors being in possession of goods and selling or buying them in their own name practically have all the powers of an owner when dealing with them in the ordinary course of business, and when the person who takes them is acting in good faith and without any knowledge of a breach of duty, or that the factor is not the true owner. The common law gave the factor all the powers that might naturally be implied from the fact that he was an agent for sale and could sell in his own name, but did not allow him to pledge the goods, as that was not a necessary power for carrying out the object of his employment as agent. In the course of business the power of pledging was found both necessary and convenient, and the law as to factors' powers was settled by the Factors Act, 1889 (*i*).

Factor can
sue in his
own name.

Partners.

Partners are persons who have entered on a business in common with a view to profit—the business not being a company or incorporated by Act of Parliament or charter. By the relation of partnership every partner is an agent for the rest for the purpose of the business; and his acts in the usual way of business, therefore, bind the firm, unless the person dealing with him knows he has no authority (*k*). The legal relations arising out of the contract of partnership do not properly come under the head of agency, and the reader is therefore referred to books dealing with the subject, such as Pollock on Partnership.

Bank Managers.

The authority of bank managers is regulated by custom, and also, in the case of joint stock banks, by the articles

Managers of
banks, autho-
rity of.

(*h*) *Waters v. Monarch Life Ass.* (1848), 5 El. & Bl. 870; *Craufurd v. Hunter* (1798), 8 T. Rep. 13, at p. 25.

(*i*) 52 & 53 Vict. c. 45.

(*k*) *Hawken v. Bourne* (1841), 8 M. & W. 703, at p. 710.

of association. The duties of a bank manager would usually be to conduct banking business on behalf of his employers; and, when he is so acting, what is done by him in the way of ordinary banking transactions may be presumed to be, until the contrary is shown, within the scope of his authority, and his employers would be liable for his mistakes, and, under some circumstances, for his frauds in the management of the business; but the arrest and still less the prosecution of offenders is not within the ordinary routine of banking business; and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties; these may, and in practice do, vary considerably. In the case of a chief or general manager invested with the general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him, at least, in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors (*l*). In the case of *The Bank of New South Wales v. Ouston*, the Privy Council held that a sub-manager had no power to arrest anyone on behalf of the bank. It has been held to be within the scope of a manager's general authority to make inquiries as to the solvency and commercial credit of persons with whom the bank intends to have pecuniary transactions, and also for a manager to reply to such questions (*m*).

Effect of fraudulent representation as to credit of customer by manager.

It has been held, however, that if a manager fraudulently misrepresents the credit of a customer, the bank is not liable unless it has profited thereby; for to charge any person upon or by reason of any representation or

(*l*) *Per* Sir Montague Smith in *Bank of New South Wales v. Ouston* (1879), 4 Ap. Cas. 270, at p. 289.

(*m*) *Swift v. Winterbottom* (1873), L. R. 8 Q. B. 244; see the case on appeal, *Swift v. Jewsberry* (1874), L. R. 9 Q. B. 301.

assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealing of any other person, to the intent or purpose that such other person may obtain credit, money or goods thereupon, such representation must be in writing signed by the party to be charged therewith (*n*). To make the bank liable, it is necessary to prove an express authority in writing, such as a resolution of the board, authorizing the fraudulent representation (*o*).

If the bank or corporation has gained by the fraud or misrepresentation thereby, it is liable, but not otherwise; for, as Lord Selborne says in his judgment in *Houldsworth v. City of Glasgow Bank* (*p*), quoting Lord Cranworth, "An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited by those frauds, but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but fraud, must seek his remedy against the directors personally." In *Swift v. Jewsberry*, only the bank manager was held liable, for the bank had not profited or taken advantage of their manager's fraud. Lord Coleridge, in giving judgment, said, "Justice points out and authority supports justice in maintaining that when a corporation takes advantage of the fraud of their agent they cannot afterwards repudiate the agency, and say that that which has been done by the agent is not an act for which they are liable." Sir Montague Smith, in *Mackay v. The*

If manager commits a fraud in exercise of authority, principal liable to the extent to which he benefited.

(*n*) 9 Geo. IV. c. 14, s. 6.

(*o*) *Swift v. Jewsberry* (1874), L. R. 9 Q. B. 301, at p. 312.

(*p*) (1880), 5 Ap. Cas. 317; see also *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259.

Commercial Bank of New Brunswick (q), held the bank liable for the fraud of its manager, as he had been acting within the scope of his authority, and it had received a benefit from the fraud. There a manager, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested (but without the knowledge of the president or directors of the bank), by a fraudulent representation induced a customer to accept a bill in which the bank was interested.

Whether an action for deceit lies against a company.

Sir Montague Smith in that case held that an action of deceit would lie against the company; this Lord Selborne explained (r) to mean that there might be cases on which to work out the appropriate remedy against a principal who had profited by the fraud of his agent, the form of action, technically called an action of deceit, might be either necessary or convenient.

Authority of manager to discount bills.

As a manager has power to discount bills and make advances to the customers of the bank, any loss from so doing will have to be borne by the bank, unless bad faith is proved. And although a manager may have shares in a company whose bills he discounts, he is not liable for any loss on the bills, unless bad faith is proved against him, for such discounting is in the ordinary course of his authority (s).

Masters of Ships.

Masters of ships.

"The authority of the master of a ship is large, and extends to all acts that are usual and necessary for the use and enjoyment of the vessel; but it is subject to several well-known limitations. He may make contracts for the hire of the ship for carrying, or he may vary that which the owner has made: he may take up money in foreign ports, and under certain circumstances at home for necessary

Authority to contract for employment of ship.

(q) (1871), 5 P. C. 394.
(r) *Houldsworth v. City of Glasgow Bank* (1859), 5 Ap. Cas. 317,

at p. 328.
(s) *The Bank of Upper Canada v. Bradshaw* (1867), 1 P. C. 479.

disbursements for repair, and bind the owner for repayment: but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is. He may make contracts to carry goods on freight, but cannot bind the owner to carry freight free. So with regard to goods put on board, he may sign the bill of lading, and acknowledge the nature and quality and condition of the goods. Constant usage shows that the master has a general authority, and if a more limited authority is given, the party not informed of it is not affected by such limitation. The master is general agent to perform all things relating to the ship, and the authority of such an agent to perform all such things *usual in the line of business in which he is employed* cannot be limited by any private orders not known to the party in any way dealing with him" (t). He cannot bind the owners to a charterparty before the ship arrives in port, as his authority only arises when he is in a foreign port, and there is a difficulty in communicating with the owners (u).

General agent to do all things connected with ship.

Cannot make charterparty before ship arrives.

The master may borrow on the credit of the owners; and to justify him in borrowing it is not necessary that the occasion should arise in a foreign country, but the case must be one where the necessity is pressing, and the master and the owner cannot communicate without great prejudice and delay. It has been held that being separated from the owner by eleven miles is not a sufficient distance to justify his borrowing (v). The master's borrowing powers depend on the difficulty of communication entirely; and in countries where he can obtain supplies by telegraph, these powers will be very small.

May borrow when he cannot communicate with owner.

(t) *Per Jervis, C. J., Grant v. Norway* (1851), 10 C. B. 665.

(u) *The Fanny* (1883), 5 Asp. 75.

(v) *Johns v. Simons* (1842), 2 Q. B. 425.

Master has authority to do what prudent owner would have done in owner's absence.

In a case (*x*) before Chief Justice Abbott, it was contended that the power of the master to bind the owner was confined to what was absolutely necessary for the use and enjoyment of the ship, and the Chief Justice said: "I think that rule too narrow, for it would be extremely difficult to decide, and often impossible in many cases, what is absolutely necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent man if present would do under the circumstances in which the agent in his absence is called upon to act" (*y*). It has been held that the liability of a vessel to arrest was such a necessity. For the general interests of all parties concerned in the adventure in which the ship is engaged; and for the protection and preservation of their property, the master may, in case of necessity when he cannot communicate with the owner, of his own authority hypothecate the ship, freight and cargo (*z*).

May mortgage ship,

The master is, as has been seen, the general agent of the shipowner; he is not the agent of the owners of the cargo. He may become such, however, by the necessity of the case. Lord Kingsdown said, "The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. If in the circumstances something must be done, and there is nobody present who has authority to decide what is to be done, then the master is invested by presumption of law with authority to give directions, on the ground that the owners have no means of expressing their wishes. But when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master because

(*x*) *Webster v. Seckamp* (1833), 4 P. C. 505.
B. & Ad. 352.

(*z*) *The Bonaparte* (1851), 8 Moo.

(*y*) *The Karnak* (1869), L. R. 2 P. C. 459.

the necessity does not arise" (a). As the power to hypo- and cargo. thecate the cargo only arises from necessity, and if the master cannot communicate with the cargo owners for directions, a person taking a bottomry bond without inquiries as to both the necessity and the impossibility of raising the money on credit is liable to have the bond held bad if there was in fact no such necessity or impossibility of communication (b).

The amount for which the bond is found to be good depends on the question how much was in respect of necessities. The question of *bona fides* affects only the primary question whether the bond is valid at all; but if the bond has been pronounced to be valid, then the case is referred to the registrar and the merchants to say how much of it is in respect of necessities, and it will be bad as regards each item to the extent by which such item exceeds the amount that was actually necessary (c). Bottomry bonds have now gone almost out of use, and the master has a lien, under the Merchant Shipping Act, 1889, s. 1, for his disbursements.

A master has no *prima facie* authority to sell the ship; May sell ship the authority only arises when he is compelled to do so in case of necessity, by necessity, the *onus probandi* that there was such a necessity depends upon the purchaser (d). In the case of *The Atlantic Mutual Insurance Co. v. Huth* (e), the question arose as to whether a master of a ship which has been wrecked has power to sell the cargo while on the vessel, and cargo. and the Court of Appeal said: "In our opinion purchasers of cargo from a master cannot justify the sale, unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination, and that he

(a) *The Hamburgh* (1864), Br. & Lush. 253.

(b) *Heathorn v. Darling* (1836), 1 Moo. P. C. 5, at p. 14, and *The Bonaparte* (1851), 8 Moo. P. C. 459.

(c) *Per Brett, M.R., The Pontida* (1884), 9 P. D. 177.

(d) *The Australia* (1844), Swa. 480, at p. 484.

(e) (1880), 16 C. D. 474.

could not, by any means available to him, carry the goods or procure the goods to be carried to their destination as merchantable articles, or could not do so without expenditure clearly exceeding their value after their arrival at their destination." In that case the cargo was tin, and was practically uninjured by being wrecked. The captain, although the ship was wrecked only fifty miles away from a port, made no effort to procure funds to save the cargo, but sold it. The Court held the sale was bad under the circumstances. Lord Justice Cotton commented strongly on the fact that perishable and non-perishable goods were all sold in one mass; and said it was difficult to see how the master could under any circumstances justify such a proceeding.

No authority to sign bill of lading for goods not shipped.

A master, from his position, derives no authority to sign a bill of lading for goods not actually shipped; and a person taking a bill of lading for goods which never have been put on board is bound to show the particular authority given to the master to sign it (*f*).

Can delegate authority.

The master of a ship has a power of delegating his authority, and the owner will be responsible for such substitute's acts (*g*).

Counsel.

Authority of counsel.

It having been suggested that retainer as counsel only implied the exercise of power of argument and eloquence, Mr. Justice Blackburn (*h*) described counsel's authority as follows: "Counsel have far higher attributes, namely, the exercise of judgment and discretion in emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill and discretion. Counsel, therefore, being ordinarily

(*f*) *Per* Jervis, C. J., in *Grant v. Norway* (1851), 10 C. B. 665.

(*g*) *Abbott's Merchant Shipping*, p. 85.

(*h*) *Strauss v. Francis* (1866), L. R. 1 Q. B. 376, at p. 381; see also *Rumsey v. King* (1876), 33 L. T. 728.

retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause; and if within limits of this apparent authority he enters into an agreement with the opposite counsel, in every principle this agreement should be held binding; and a barrister had authority to make an admission of a fact" (i). But a barrister only represents his client when speaking for him in Court, and not at other times. A solicitor, on the contrary, represents him throughout the cause (j).

Solicitors.

Solicitors, who are officers of the Supreme Court, are persons who conduct legal business for others. They are not the general agents of the person who employs them generally, but only for the particular business they have received a "retainer," or authority to act. Solicitors are not, as such, general agents for legal purposes of the person who happens to employ them, no more than a doctor is of the person employing his skill; a notice to them does not affect the client. Lord Justice James said: "A solicitor is not an agent for the purpose of receiving notice of an incumbrance created by a *cestui que trust* because he was the solicitor employed to invest the moneys, or even because afterwards he for convenience received from the mortgagor the interest, and handed it, by direction of the trustees, to the different persons entitled to receive it"; and in the same judgment said: "I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of a solicitor, that is to say, that a man has got a solicitor not as a person whom he employs to do

Solicitors not
general
agents.

(i) *Colledge v. Horn* (1825), 3 Bing. 119; *Haller v. Worman* (1861), 3 L. T. 741. (j) *Richardson v. Peto* (1840), 1 M. & G. 896.

some work for him, . . . but as an official solicitor, and that because the solicitor has been in the habit of acting for him, or has been employed to do something for him, that solicitor is his agent to bind him by anything he says, or to bind him by receiving notices or information. There is no such officer known to the law. A man has no more a solicitor, in that sense, than he has an accountant, or baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ or deal with him, and in the matter so employed" (*k*). And Lord Justice Cotton, commenting on the above, said: "But where a man employs a solicitor as to a particular property, the solicitor has a general authority not to do acts which bind the client without communication with him, but to enter into negotiations on his behalf" (*l*). The principal who employs such attorney is bound by every act done by the solicitor in the ordinary course of business, and within the scope of his employment; so he may compromise a suit, provided he acts *bonâ fide* and reasonably, that is unless he has instructions to the contrary (*m*).

Solicitor has general authority to compromise an action.

It was agued in *Prestwich v. Poley* that a solicitor had no general authority to compromise an action, even where he was not forbidden to do so, but the Court held he had. Chief Justice Erle, in giving judgment, said: "It is clear that there was no express prohibition to the attorney to compromise, and the question for us to determine is whether the general retainer as attorney gave authority to compromise the action in this way. . . . I am unable to say that the plaintiff's attorney has in any respect gone out of the ordinary and proper course of his duty in the arrangement he has effected." Mr. Justice Byles said: "I am of the same opinion. No authority has been cited before us to show that an attorney who has the legal

(*k*) *Saffron Walden Building Society v. Rayner* (1880), 14 C. D. 406.
(*l*) *Hester v. Hester* (1887), 31 C.

D. 307 at p. 616.

(*m*) *Prestwich v. Poley* (1865), 18 C. B. N. S. 806.

management of the cause has not power in the *bonâ fide* exercise of reasonable care and skill to compromise an action in any manner he may find may be for the interest of his client."

The general appointment of a solicitor gives him authority to defend an action, though not to commence it (*n*). It is desirable that if possible there should be a written retainer. Lord Eldon said, "It is settled that if the plaintiff denies and the solicitor asserts authority to have been given, and there is nothing but assertion against assertion, the Court will say that the solicitor ought to have secured himself by having an authority in writing, and that not having done so he must abide by the consequences of his neglect. There must be a special authority to institute, though a general authority is sufficient to enable the solicitor to defend a suit." The authority extends to everything that is necessary for the accomplishment of the work for which the solicitor is retained or employed (*o*).

Appointment as solicitor authorizes defending, but not instituting an action.

If the solicitor is to bring an action he must have a special authority to do so. He continues, when appointed, to have authority until judgment is satisfied. A solicitor ought to have a special authority if he is going to put his client to any exceptional expense. Speaking of foreign journeys which a solicitor wished to charge for, the late Master of the Rolls, Sir George Jessel, said: "A solicitor has no right to take special journeys, or go to foreign countries at the expense of his client without specific instructions, nothing really is better settled; otherwise the unfortunate client in giving a retainer to a solicitor would thereby authorize him to travel all over the world at his expense." The Court of Appeal, on the special facts, reversed the judgment, but specially endorsed the Master of the Rolls' statement of the rule (*p*).

Special authority required for commencing action.

Special authority for journeys abroad necessary.

(*n*) *Wright v. Castle* (1817), 3 Mer. 12; *Wiggins v. Peppin*, 2 Beav. 403.

(*o*) *Reg. v. Lichfield* (1817), 16 L. J. Q. B. 333.

(*p*) *In re Snell* (1877), 5 C. D. 815.

CHAPTER VII.

DELEGATION.

Agent can usually delegate his authority.

IN most text-books on agency the rule is laid down that *delegatus non potest delegare*, and then the exceptions to the rule are given. As the rule is more honoured in the breach than the observance, it seems that the rule ought perhaps to be given the other way, and ought rather to be—an agent can delegate the subject-matter of the agency to others unless he has undertaken, expressly or impliedly, to perform it himself (a).

Lord Justice Thesiger explains the rule thus (b):—"As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analysed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfil; and that inasmuch as confidence in the particular person employed is at the root of the agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do, from time to time, render necessary the carrying out of instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case

(a) Smith's Mercantile Law, 10th ed. p. 116.

(b) *De Bussche v. Alt* (1878), 8 C. D. 286, at p. 310.

the reason of the thing requires that the rule should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a 'sub-agent' or substitute; and on the other hand to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied, where from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of the employing a substitute; and that when such authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes responsible to the former for the due discharge of the duties which his employment casts upon him as if he had been appointed agent by the principal himself."

As where
necessary by
usage of trade.

Sometimes commercial usage requires an agent to appoint a substitute, without creating privity of contract between the principal and the sub-agent; and that in other cases there is an authority not only to appoint a substitute, but also to create privity between him and the principal.

Privity of
contract be-
tween princi-
pal and sub-
agent.

Whether there is such privity or not seems to depend, as Lord Justice Thesiger points out, (1) on the original contract of agency, (2) the usage of the trade, and (3) the nature of the subject-matter of the agency. Where the agent is authorized to employ a sub-agent and create privity of contract between the principal and the sub-agent, the agent will not be liable for the acts and omissions of the sub-agent appointed or employed by him, unless in the appointment or substitution he is guilty of

fraud or gross negligence, or improperly co-operates in the acts or omissions (b).

Master of ship
can delegate
signing of
charter-party.

In the case of *The Fanny* (c), Sir Robert Phillimore held that a master of a ship could delegate his authority to sign a charter-party for the owner to a shipbroker, when that was the most convenient way of conducting business; and that by doing so privity of contract was created between the shipbroker and the owner.

Agent liable
for acts of
sub-agent if
no privity
of contract
between him
and the
principal.

If the principal refuses to allow the agent to delegate his authority the latter remains solely liable to the principal. Thus, in *Meyerstein v. The Eastern Agency Co.* (d), the defendants, the agents, contended that they were not liable for the price of certain goods which had been consigned to them for the purpose of getting them sold by a sub-agent in China, and insisted that the sub-agent in China was alone liable. It appeared that the principals refused from the very beginning to look to the sub-agent, and said they would hold the defendant company alone responsible. Baron Huddleston, under these circumstances, held that there was no privity of contract, and that being so, "it was clearly established that where there was no privity of contract between the principal and the sub-agent, or substituted agent, that the intermediate was liable to the principal for the sub-agent." The House of Lords, in *Mackersy v. Ramsays* (e), held that it did not necessarily follow because the principal knew the agent would have to employ a sub-agent, that he had authority to establish privity of contract so as to escape liability.

Lord Campbell said, "The general rule of law that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent" (f).

(b) Story, sect. 201.

(c) (1883), 5 Asp. 74.

(d) (1884), 1 Times Rep. 595.

(e) (1813), 9 C. & F. 818.

(f) At p. 845; see, also, *Macdonald v. Macdonald* (1781), Hume's

It would seem, from first principles, that even where the agent had authority to establish privity of contract and did not take care to appoint a proper sub-agent, he would be liable to the principal for such breach of duty, and any loss resulting to him from such appointment (see "Liability of Agent to Principal").

Whether the sub-agent is liable to the principal depends upon whether there was privity of contract between him and the principal. Where the sub-agent is employed by the agent to act only for him the sub-agent is not liable to the principal. In *The New Zealand Land Co. v. Watson (g)*, the principal sued the sub-agent for a sum of money which the latter had received as the price of goods: the sub-agent denied that there was any privity of contract, and claimed to be entitled to set off the liability of the agent against the price of the goods. It appeared, that while the principal employed an agent on one set of terms, the latter employed a sub-agent on different terms. The judge asked the jury two questions, first—whether the sub-agent was employed by the principal, and whether he accepted that employment? to which the jury replied in the negative. Next, whether the sub-agent knew the agent was acting for the principal? This question the jury answered in the affirmative. On these findings the Court of Appeal held there was no privity of contract. It does not seem to follow that there is no privity of contract between the principal and sub-agent in every case where the sub-agent is employed by the agent on different conditions, and does not know for whom he is acting as sub-agent; the question in each case is, had the agent authority to establish the relation of principal and agent between his principal and the sub-agent? (*h*).

Privity of contract between sub-agent and principal.

Collection of Cases; *M'Fickar v. MacGregor* (1781), Hume's Collection of Cases; *Schmalzing v. Thomson* (1815), 6 Taunt. 147.

(*g*) (1881), 7 Q. B. D. 374.

(*h*) See Lord Bramwell in *Kaltenbach v. Lewis* (1884), 10 Ap. Cas. 617, at p. 636.

Authority to do an illegal act cannot be delegated.

It is needless to point out that there can be no delegation to a sub-agent of power to do anything that is illegal or criminal, for any contract to tempt a man to transgress the law and do that which is injurious to the community is void at common law (*i*), and the law will defeat any contract which is to do something which is a *malum in se*, or to omit doing something that is a duty, or which would tend to encourage crime, and this without regard to the circumstances, as it is concerned to remove all temptations and inducements to crimes (*k*).

Authority where confidence is reposed cannot be delegated.

The first rule as to non-delegation of power by an agent is that he cannot delegate the authority when personal confidence is reposed in his skill and honesty. Therefore in *Cockram v. Irlam* (*l*) Lord Ellenborough held that a broker could not hand over his principal to a third party. The same principle is adopted in Chancery in cases as to powers; for instance, where a power has been given to a father to appoint among his children, a delegation of this power to his wife has been held bad (*m*). The mere fact that a fiduciary agent, as a trustee, discusses how he ought to exercise his discretion with third parties has not been held a delegation of his authority if he has exercised his discretion (*n*); and the same train of reasoning applies equally to commercial agencies.

A judicial authority cannot be delegated.

An agent whose authority is of a judicial character cannot delegate it.

In *Little v. Newton* (*o*) two lay arbitrators had deferred their decision to a third, who was a barrister, on a point of law. The Court held they had no power to do so. Tindal, C. J., said: "There is no principle of law that we are aware of which will authorize any such delegation

(*i*) *Collins v. Blantern* (1767), 2 Wils. 341.

(*k*) *Per* C. J. Parker in *Mitchel v. Reynolds* (1711), Smith's Leading Cases, 9th ed. vol. 1, p. 430, and 1 P. Wms. 181.

(*l*) (1814), 2 M. & S. 300.

(*m*) *Chester v. Chadwick* (1842), 13 Sim. 102.

(*n*) *Fraser v. Murdoch* (1881), 6 Ap. Cas. 855, at p. 864.

(*o*) (1841), 2 Scott, N. R. 509, at p. 519.

of the judicial authority conferred upon the three, and it is impossible to say that if the determination of the legal arbitrator had been disclosed to either of the other arbitrators before the signature of the award some argument or observation might not have been made which would have led to a different conclusion."

In another case of an award by arbitrators (*p*), it was decided that they might consult the umpire, but could not give up their own opinions to be bound by him. Lord Cranworth said, as to Mr. Southern (one of the arbitrators):—"It appears not that he consulted Mr. Peacock (the umpire), and was satisfied by him of the land being worth 400*l.* an acre, but that he consulted Mr. Peacock, and, finding that he said 400*l.* was the value, he (Mr. Southern), although he did not think it worth 200*l.*, concurred in the award because he thought it no use differing. That is not a course which referees have a right to pursue, and an award so made was not one by which the persons (the principals) who had agreed to take the reference were bound. They were entitled to have the unbiassed judgment of the umpire; not in a loose way giving an opinion, but dealing judicially with that upon which it was his duty to decide" (*q*).

So, again, where (*r*) a judge, instead of exercising his discretion in appointing a liquidator, directed he should be appointed on the nomination of a third party without approving of the nomination first. The Court of Appeal held such a delegation of authority was bad.

Merely subsidiary acts, which involve no discretion, may be delegated. So, where a principal gave a power of attorney to his agents to draw bills in his name, it was held that where the agents might themselves have drawn the bills they could authorize their clerks to draw

Authority to do subsidiary acts may be delegated.

(*p*) *Eads v. Williams* (1854), 4 De 9 L. T. 730.
G. M. & G. 674.

(*r*) *Re Great Southern Mysore Co.*
(1883), 48 L. T. 11.

(*q*) See also Mr. Justice Shee's judgment in *Ellison v. Bray* (1864),

them, the act of drawing being merely ministerial (s). It has been held that the signing of a bought-and-sold note by a broker's clerk is not a sufficient signing by an agent within the Statute of Frauds, the broker having no authority to delegate such a duty to his clerk (t).

Where no discretion or skill required in agent he may delegate authority.

Where no personal skill or discretion is requisite, an agent can delegate his authority. Mr. Justice Willes says (u): "If a person is appointed to some function, or selected for some employment to which peculiar personal skill is essential—as a painter engaged to paint a portrait—he cannot hand it over to someone else to perform; but when the thing to be done is one which any reasonably competent person can do equally well, or when any discretion to be exercised is in respect of a merely ministerial act, a deputy may be appointed"; and held the acts to be done by a sexton fell within the latter class.

Steward of manor may delegate.

The steward of a manor may appoint a deputy to act as steward, and the deputy may do all that the steward himself could have done (v).

Where from the nature of business it is necessary that the authority should be delegated, the agent may delegate it.

Lord Fitzgerald said (w): "I accept it, then, as settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of a trust fund avail himself of the agency of third parties, such as bankers and others, if he does so from a moral necessity, or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated, unless negligence or default of his led to the result."

(s) *Ex parte Sutton* (1788), 2 Cox, 457.

(t) *Henderson v. Barnewell* (1827), 1 Y. & J. 387.

(u) *St. Margaret's Burial Board v. Thompson* (1871), L. R. 6 C. P.

(v) *Parker v. Kett* (1701), 1 Ld. Raymond, 658.

(w) *Speight v. Gaunt* (1883), 9 Ap. Cas. 1 at p. 29.

It will be seen from the foregoing that an agent cannot delegate his powers unless the custom of business required it; and the authority does not require for its exercise any personal confidence or skill to be reposed in the agent, and the authority is not judicial. Hence it has been held that the directors of a company cannot delegate their powers of allotting shares to any of their number (*x*).

Directors of a company cannot delegate the allotting of shares.

Where two railway companies made an agreement which the Court held was a practical delegation by one of them of all the powers that Parliament had given it, the Court refused to enforce the agreement (*y*). Vice-Chancellor Turner said: "I think there lies at the root of this case a question of public policy which precludes the interference of the Court. It is impossible to read the agreement between the plaintiffs and the East Anglian Railway Company without being satisfied that it amounts to an entire delegation to the plaintiffs of all the powers conferred by Parliament upon the East Anglian Railway Company. All the stock of that company is to be taken by the plaintiffs without any obligation to restore it; the plaintiffs are to manage and regulate the railways of the East Anglian Railway Company for the purposes of the agreement; and although in form it is declared that the instrument shall not operate as a lease or an agreement, it amounts in substance to either one or the other. It is framed in total disregard of the obligations and duties which attach to companies, and is an attempt to carry into effect without the intervention of Parliament what cannot be lawfully done except by Parliament in the exercise of its discretion with reference to the interests of the public."

Where against public policy authority cannot be delegated.

(*x*) *In re the Leeds Banking Co., Howard's case* (1866), 1 Ch. Ap. 561. (*y*) *G. N. Ry. v. Eastern Counties Ry.* (1851), 21 L. J. 837.

CHAPTER VIII.

THE DUTIES OF AN AGENT.

Duties of agent:—

1. Mode of performance;
2. Diligence in execution;
3. Incidental acts required by law.

Duty to make a contract binding in law.

If under seal ought to execute it in principal's name.

STORY considers the duties and obligations of an agent and his principal under three heads. What is the proper mode of executing the authority? What degree of diligence is required of an agent? What are the incidental acts required of him by law? In the Chapter on "Delegation" we have dealt with the limits which the law puts upon his delegating his duties to another. We have seen that if a broker delegates the signing of bought and sold notes to a clerk, there is no sufficient memorandum in writing to satisfy the Statute of Frauds (*a*). And it was doubted whether an auctioneer's clerk could sign a binding memorandum (*b*). The first duty of an agent clearly is, if he is making a contract, to make one which will be legally binding, and on which the principal can sue.

If the contract, therefore, is by deed, the agent ought to sign it in the principal's name, and not in his own, or it will not be binding on the principal, as a contract under seal can bind none but those who sign and seal it (*c*), *i.e.*, the parties executing the deed. But it has been held that the mere fact of the seal to the contract being that of the principal will not make him liable if, on the construction of the document, it appears the liability is one undertaken by the agent (*d*).

(*a*) *Henderson v. Barnewell* (1827), 2 Younge and Jervis, 387.

(*b*) *Coles v. Trecothick* (1804), 9 Ves. 235.

(*c*) *Beckham v. Drake* (1841), 9 M. & W. 79, at p. 95; *Combe's case*

(1614), 9 Co. Rep. 77; *Frontin v. Small* (1726), 2 Ld. Raymond, 1419; but see sect. 46 of Conveyancing Act, 1881—44 & 45 Vict. c. 41.

(*d*) *Dutton v. Marsh* (1874), L. R. 9 Q. B. 361.

Similarly, in the case of bills of exchange, each person who receives the bill is making a contract with the parties upon the face of it, and with no other party whatsoever. For the case of bills of exchange stands upon the law merchant, and so do promissory notes, as they are placed on that footing by a statute of Queen Anne. In neither of these can any but the parties named in the instrument by their name or firm be made liable to an action (*e*). But it was held in *Lindus v. Bradwell* that if the principal authorized another to accept a bill in that other's name, that will bind him, though his own name does not appear (*f*); there it appeared that a husband authorized his wife to endorse a bill of exchange in her name, and he was accordingly held liable.

When the contract is not by deed, but parol, the principal is bound, even if he is not mentioned. Lord Abinger said: "There is no question that a contract in writing by an agent, signed by himself, will bind his principal when the other contracting party discovers the principal, although the contract was made without his knowing who the principal is; as, for instance, in the case of a bill of lading signed by the master, where the action is brought against the owners. It is also the case of every charter-party which is signed by the owner, where the owner is rendered liable by the acts of the master, because the master is his agent. So it is in a vast variety of other cases which frequently occur, all establishing one principle, that the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another. I say the parties really contracting, because it is possible that an agent meaning to contract in his own name is the party to sue" (*g*).

Not necessary
where the
contract not
by deed.

(*e*) *Beekham v. Drake* (1841), 9 M. & W. 79, at p. 96; *Fox v. Frith* (1842), 10 M. & W. 131; *Emly v. Lye* (1817), 15 East, 7.

(*f*) *Lindus v. Bradwell* (1848), 5 C. B. 583; see also *Edmunds v. Bushell* (1865), L. R. 1 Q. B. 97.

(*g*) *Beekham v. Drake*, *ubi supra*.

Chief Justice Cockburn sums up the authorities thus :
 “The effect of the authorities is clearly then that where parties, in making a promissory note or accepting a bill, describe themselves as directors or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company, they are individually liable. But, on the other hand, if they state they are signing the note or the acceptance on account of or on behalf of some company or body of whom they are the directors and representatives, in that case, as the case of *Lindus v. Melrose* (*h*) fully establishes, they do not make themselves liable when they sign their name, but are taken to have been acting for the company, as the statement on the face of the document represented” (*i*).

No difference at common law between verbal contract and a written contract not under seal.

It must be always borne in mind that there is no difference, except when a difference is made by statute—there is no difference at common law between a contract by word of mouth and a contract in writing not under seal (*k*). It is the well-established rule of law that where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party (*l*).

Same principle applies to charter-parties.

The same principle applies to charter-parties where, as in every other contract, if the agent chooses to make himself a contracting party, the other contracting party may either sue the agent who has himself contracted, though

(*h*) (1858), 3 H. & N. 177.

(*i*) *Dutton v. Marsh* (1874), L. R. 6 Q. B. 361; *Deslandes v. Gregory* (1860), 2 F. & El. 602. See, however, *Gadd v. Houghton* (1876), 1 Ex. Div. 357.

(*k*) *Per* Willes, J., in *Calder v. Dobell* (1871), 6 L. R. C. P. 486.

(*l*) See L. C. J. Denman in *Sims v. Bond* (1833), 5 B. & Ad. 389, at p. 393.

on behalf of another, or he may sue the principal who has contracted through his agent, and this whether the principal was known at the time or not, or whether it was or was not known that there was a principal (*m*).

It was held that a person who executed a deed for another under a power of attorney had to execute it in the name of his principal; but if that be done it mattered not in what words the execution was effected. As by the 46th section of the Conveyancing Act, 1881, an attorney may execute it in his own name for his principal, the essential matter seems now to be in what capacity he executed the deed, whether for himself or his principal. Mr. Justice Lawrance, in *Wilks v. Back* (*n*), said, "No doubt in point of law the act done must be the act of the principal, and not of the attorney who is authorized to do it. The whole argument has turned upon an assumption of fact that this was the act of the attorney, which is not well founded." [The agent Wilks, one of partners, had signed a submission to arbitration of himself and his co-partner thus—Mathias Wilks (L.S.) for James Browne, Mathias Wilks (L.S.).] "This is not like the case in Lord Raymond's Reports, where the attorney had demised to the defendant in her own name, which she could not do, for no estate could pass from her, but only from her principal. But here the bond was executed by Wilks for and in the name of his principal, and this is distinctly shown by the manner of making the signature. Not even this is necessary to be shown, for if Wilks had signed and sealed and delivered it in the name of Browne that would have been enough without stating he had so done. . . . There is no particular form of words required to be used, provided the act be done in the name of the principal" (*o*).

No form of words necessary if act done in name of principal.

(*m*) *Per* Blackburn, J., *Christofferson v. Hansen* (1872), L. R. 7 Q. B. 509.

(*n*) (1802), 2 East, 140.

(*o*) See also *Downham v. Williams* (1845), 7 Q. B. 103.

The mere fact, however, that the third party has, after knowing that there is a principal and knowing his name, insisted on the agent's name being put down in the contract, does not relieve the principal from liability (*p*).

Primâ facie
agent signing
without quali-
fication con-
tracts per-
sonally.

The question whether the person actually signing the contract is to be deemed to be contracting personally or as agent only, depends upon the intention of the parties as discoverable from the contract itself; and it may be laid down as a general rule that *where a person signs a contract in his own name without qualification he is primâ facie to be deemed a person contracting personally*, and in order to prevent the liability from attaching it must be apparent from other portions of the document that he did not intend to bind himself as principal (*q*).

Signing as
agent, not
liable.

The Courts at first showed a tendency, as evidenced by a large number of decisions, to regard the words "as agent" as merely descriptive, and also the word "director" when used after a director's name, although he was signing a document in which the company were alone interested, see *Dutton v. Marsh* (*r*).

The Court of Appeal in more recent cases, however, seems to be more inclined to hold, in accordance with the manifest intention of the parties signing "as agents," that these words were put expressly to avoid liability (*s*). Sir George Jessel, in *Southwell v. Bowditch*, quoted Mr. Justice Blackburn's decision in *Fleet v. Murton* (*t*), in which he said that a broker, as such, merely dealing as broker and not as purchaser, makes a contract, from the very nature of things, between the buyer and the seller, and he is not himself either buyer or seller; and consequently when the contract says "sold to A. B.," or "sold to my principals," and the

(*p*) *Calder v. Dobell* (1871), L. R. 6 C. P. 486.

(*q*) *Hick v. Tweed* (1890), 63 L. T. 765; 2 Smith's Leading Cases, 9th ed. p. 420.

(*r*) *Ubi supra*; *Paice v. Walker*

(1871), L. R. 5 Ex. 173; *Weidner v. Hoggatt* (1876), 1 C. P. D. 533.

(*s*) *Southwell v. Bowditch* (1876), 1 C. P. D. 374, and *Gadd v. Houghton* (1876), 1 Ex. Div. 357.

(*t*) (1871), L. R. 7 Q. B. 126.

broker signs himself simply as broker, he does not make himself by that either purchaser or seller. And the late Master of the Rolls held, therefore, (*u*) that in those cases in which the contract said "sold by your order and for your account" and "to my principals," there was nothing to show that the agent intended to act otherwise than as broker, he was not liable. Sir George Jessel said, "No doubt it does not absolutely follow from a person appearing in the contract to be a broker that he is not liable as principal; there are two ways in which he might be so liable: first, *intention* on the face of the contract making the agent liable as well as the principal; secondly, usage." Lord Justice James, in *Gadd v. Houghton* (*v*), said, "When a man says he is making a contract on account of 'some one else' it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to *Paice v. Walker* (*x*), I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea. If that case were now before us I should hold that the words 'as agents' in that case had the same effect as the words 'on account of' in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, but I do not think the words 'as agents' were words of description."

Agent contracting as broker not liable.

Verbal evidence may be given to show in what capacity a document has been signed where the signature is ambiguous. Thus, in *Young v. Schuler* (*y*), the defendant, who had a power of attorney to sign a contract on behalf of another, also intended to guarantee its fulfilment personally,

Where the document is doubtful verbal evidence may be given. In what capacity the

(*u*) *Southwell v. Bowditch* (1876),
1 C. P. D. 374.
(*v*) (1876), 1 Ex. Div. 357.

(*x*) (1871), L. R. 5 Ex. 173.
(*y*) *Young v. Schuler* (1883), 11
Q. B. D. 651.

signature
was put.

but only signed the contract once. The Court admitted verbal evidence to prove that he signed the contract in both capacities. The signature was as follows:—"P.P.A., John Abraham & Co., J. Otto Schuler." Lord Esher said: "Looking at the document alone this is doubtful, and if there were no evidence on the subject I should say Schuler signed only for Abraham & Co. But the questions whether a person has signed his name at the foot of a document, and, if so, for what purpose, are questions of evidence, and any evidence on the subject which does not contradict the document is admissible" (y).

Duty of agent
to observe
terms of
authority.

An agent ought to adhere to the terms of the authority. If he travels outside the authority (apart from any question of estoppel), the assumed exercise of authority may be absolutely bad, or may be only bad as to the part which is outside the authority. Thus, if he is given power to receive payment of a bill, he cannot receive payment clogged with a condition without the assent of the principal, nor cancel the bill as paid (z). Whether the exercise of authority is altogether bad, or bad only as to part, depends on whether the contract made by the agent is in its nature entire and indivisible, or severable. Thus, it was held that the exercise of the authority was altogether bad in *Baines v. Ewing* (a), where a broker to an underwriter, who had been told not to underwrite any loss beyond 100*l.*, underwrote one for 150*l.* As to the effect of the exercise of a power outside the authority in Chancery, see *Farwell on Powers*, and *Roe v. Prideaux* (b), and *Alexander v. Alexander* (c).

Where the
exercise of the
authority is
indivisible
and part bad,
the whole
is bad.

If the autho-
rity is dis-
carded the
agent is
responsible for
any damage
that ensues.

As the agent's duty is to obey the instructions of his principal, if he disobeys the terms of his authority he will be responsible for any loss that occurs, and will be

(y) *Young v. Schuler* (1883), 11 Q. B. D. 651.

(z) *Bank of Scotland v. Dominion Bank*, (1891) 1 Ap. Cas. 592.

(a) (1866), 1 L. R. Ex. 320; 4

Hurl. & G. 511.

(b) (1808), 10 East, 158.

(c) (1755), 2 Ves. p. 640, at p. 644.

so liable whether he has taken reasonable care or not (*d*). The agent will not be allowed to set up that there was no natural connection between the breach of duty and the loss, for no wrongdoer can be allowed to apportion or qualify his own wrong, and cannot set up as an answer the bare possibility of a loss if his wrongful act had never been done (*e*). It might be otherwise if he could show that the loss would have happened in any case (*f*).

If the agent substantially obeys the instructions, though technically he disobeys them, and he is acting for his principal's best interests, the Court will enforce the contract (*g*). It is sufficient if the authority is substantially followed.

Thus, if when he is directed to buy 100 bales of cotton, and owing to the difficulty of procuring them he only gets eighty-four, it was held that the principal's orders were substantially complied with, and he could not refuse to pay for the bales (*h*). Mr. Justice Blackburn, in *Ireland v. Livingstone* (*i*), says "the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed by the order; if it does, the principal is not bound to take the goods. If by due exertions he can execute the order within those limits, he is bound to do so as cheaply as he can, and to give his principal the benefit of the cheapness." Of course, if the principal gives ambiguous instructions, he cannot complain if he suffers loss through the agent's placing on them an interpretation which he did not mean them to bear, if the instructions are capable of bearing the interpretation the agent put upon them, and he did so honestly (*j*).

(*d*) *Lilly v. Doubleday* (1881), 7 Q. B. D. 510. See also *Cuffray v. Darby* (1801), 6 Ves. 488, at p. 495.

(*e*) *Lilly v. Doubleday*, *ubi supra*.

(*f*) *Davis v. Garratt* (1830), 6 Bing. 716.

(*g*) *Cornwall v. Wilson* (1750), 1

Ves. 510.

(*h*) *Johnston v. Kershaw* (1867), L. R. 2 Ex. p. 82.

(*i*) (1872), L. R. 5 H. of L. 395, at p. 408.

(*j*) *Ireland v. Livingstone*, *ubi supra*.

Agent required to use reasonable skill and diligence.

The agent is bound to use reasonable skill and ordinary diligence, and is liable for any damage resulting to the principal through want of such skill and for negligence.

Chief Justice Tindal, in an action (*k*) against an insurance broker for not effecting a policy with a deviation clause, said: "The action is brought for want of reasonable and proper care, skill, and judgment shown by the defendant, under certain circumstances, in the exercise of his employment as a policy broker. The point, therefore, to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether upon the occasion in question he did or did not exercise reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to me to rest upon the further inquiry, viz., whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant—for the defendant did not contract that he would bring to the performance of his duty on this occasion an extraordinary degree of skill, but only a reasonable and ordinary proportion of it."

If he neglects to insure the proper risk, as when, instead of insuring all the goods from Gibraltar to Dublin, he only insures such goods as were put on board at Gibraltar, and the goods shipped before Gibraltar was reached are lost, he is liable for gross negligence (*l*); similarly, if he neglects to put in a usual deviation clause, or to disclose all the facts, so that the insurance is bad (*m*).

But as Lord Hatherley said in *Overend, Gurney & Co. v. Gibbs* (*n*): "It would be extremely wrong to import into the consideration of the case of a person acting as a mercantile agent in the purchase of a business concern those principles

(*k*) *Chapman v. Walton* (1833), 10 Bing. 57. See also *Comber v. Anderson* (1808), 1 Camp. 523.

(*l*) *Park v. Hammond* (1816), 6 Taunt. 495.

(*m*) *Mallough v. Barber* (1815), 4 Camp. 150; *Maydew v. Forester* (1814), 5 Taunt. 615. See also *Wake v. Atty* (1812), 4 Taunt. 493. (*n*) (1872), L. R. 5 H. of L. 480.

of extreme caution which might dictate the course of one who is not inclined to invest his property in any ventures of such a hazardous character," and he held that directors were not liable for anything short of gross negligence.

To maintain an action against the agent the principal must be prepared to prove either breach of orders, gross negligence, or fraud (o).

Common carriers are an exception to the rule, since they are liable in every case for loss, except when the loss is the act of God, the Queen's enemies, contributory negligence of the principal, or the inherent vice of the thing carried; unless the article comes under those mentioned in the Carriers Act, 1830.

Liability
of common
carrier.

Best, C. J., in *Riley v. Horne* (p), said: "From his liability as an insurer the carrier is only relieved by two things, both so well known to all the country when they happen, that no person would be rash enough to attempt to prove they had happened when they had not, namely, the act of God and the King's enemies."

And if the work done is useless the agent is entitled to nothing. Thus, in a case (q) where an auctioneer, who had been guilty of gross negligence in not inserting a usual condition of sale, Lord Ellenborough said: "Where there is a special contract for a stipulated sum to be paid for the business done by the plaintiff, it has been usual to leave the defendant to his cross-action for any negligence he complains of; but where the plaintiff proceeds as here upon a *quantum meruit*, I have no doubt that the just value of his services may be appreciated, and that if they are found to have been wholly abortive he is entitled to no compensation" (r).

Work done by
agent must
not be useless.

If an insurance broker undertakes to effect an insurance, according to special instructions, a part of the duty

If undertakes
to insure,
must inform

(o) *Per* Lord Mansfield, *Moore v. Mourgue* (1776), Cowp. 479.

(p) (1828), 5 Bing. 217.

(q) *Dence v. Daverell* (1813), 3 Camp. 451.

(r) See also *Moneypenny v. Hartland* (1824), 1 C. & P. 352.

the principal
if unable to
do so.

is the giving notice to the employer in the case of failure, and an actual promise to do so need not be proved (*s*); for the undertaking arises either out of the nature of the case or the relation in which the parties stood to each other. Whether the expectation arises from previous dealings, or from an undertaking to insure in a particular instance makes no difference.

Rule as to
effecting
insurance.

It is now settled as clear law that there are three instances in which an agent must obey an order to insure. First, where a merchant abroad *has effects* in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is where, although the merchant abroad *has no effects* in the hands of his correspondent, yet if the course of dealing between them has been such that the one has been used to send orders of insurance and the other to comply with them, the former has the right to expect that his orders for insurance will be obeyed, unless the latter give notice to discontinue that course of dealing. Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction (*t*).

Result of
disobeying
order to
insure.

If the agent does not insure when directed to do so by his principal, he will be considered an insurer himself, and be liable for a loss (*u*).

Duty to keep
accounts.

It is the duty of an agent when he is in a position of trust to keep regular accounts of all his transactions on behalf of his principal. Lord Eldon said (*v*), "It is

(*s*) *Callandar v. Oelrichs* (1838), 5 Bing. N. C. 59.

(*t*) Buller, J., in *Smith v. Lascelles* (1788), 2 Term Rep. 187.

(*u*) *Tiekel v. Short* (1750), 2 Ves. Sen. 239.

(*v*) *Chedworth v. Edwards* (1802), 8 Ves. 47.

one of the first duties of an agent certainly to keep a clear account, and to communicate the contents of it" to his principal; and in another case (*x*) he said, speaking of a person who was both executor and agent, "If he had not been executor and trustee, an obligation was imposed upon him by his character as agent, during the life of the Duke . . . namely, the duty of protecting the estate against his own demand, to the extent of the protection that could be given by a precise and regular account of all his transactions with the Duke in his lifetime."

A commission agent is not bound to keep separate accounts at his banker's, for he is not a fiduciary agent, and the moneys he receives are his own; since, by the custom of trade, he only is liable as debtor to his employer for the amounts received, and he often makes advances in anticipation of receiving the proceeds of sale. "A commission agent is liable to the consignor of the goods for the amount received, and in the ordinary course of business he makes advances to the consignor, for which he charges interest and debits himself with the amount received when they are received, and credits (*sic*) (*y*) himself with interest on the other side of the account; so that the real transaction between the parties is for the consignor to treat such consignee as creditor for his advances and interest, and to regard him as debtor for the amount received and interest" (*z*).

A commission agent is not bound to have separate account at banker's.

In *Kirkham v. Peel* the plaintiff, having 100*l.* worth of goods to sell, went to a firm in Manchester and arranged that the defendants should advance 85*l.* on the goods, and take the sale of them at Bombay for a three per cent. *del credere* commission, the defendants taking on themselves the whole risk of the goods. When the defendants

(*x*) *White v. Lincoln* (1803), 8 Ves. 369.

(*y*) Query, debits himself with interest on the same side of the

account.

(*z*) *Per* Jessel, M. R., *Kirkham v. Peel* (1880), 43 L. T. 171; aff. (1881), 44 L. T. 195.

received the proceeds they were to account to the plaintiff, and credit or debit him according as the goods sold for more than the 85*l.* or less. The defendants' course of business was to send the goods to their Bombay house and sell them, and they then credited the plaintiff in Manchester with the proceeds. For the convenience of their business and to avoid the loss in exchange, instead of actually remitting the proceeds by bills or in specie to the Manchester house, they bought other goods. The plaintiff sought for an account of profits of these investments of the proceeds of his goods sold at Bombay. Lord Justice James, in refusing the account, said: "To my mind it is totally unheard of that any gentleman can say I shall not be satisfied with an account of what you have received or might have received for the goods, but I ask you to tell me what you did, not with my possible balance of 15*l.*, but with the whole sum you received and have invested. If he is a factor or a mortgagee he has to account for the balance; but subject to that, such proceeds of sale are as much his moneys as any other moneys that he has in his possession or under his control. There was no bargain that he would not mix them with his own moneys. He was under a distinct obligation to keep distinct accounts, and was to show what was ultimately due to or from him; but that was all. He dealt with the goods in the ordinary course of business, and that is how it would have stood if no accounts had been rendered."

Duties of *del credere* agent.

A *del credere* agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal, and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; and therefore if he sells at the price at which he is authorized by the principal to sell, and upon the credit which he is authorized by his principal to give, and the customer

pays him according to his contract, no doubt he is bound, like any other agent, as soon as he receives the money, to hand it over to the principal (z).

But with regard to factors, Lord Langdale said: “Among the most important duties of a factor are those which require him to give to his principal the free and unbiassed use of his discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own, or the property of other persons” (a).

Bound to have no interest adverse to principal.

The agent ought, in the absence of instructions to the contrary, to conform to the ordinary usages of trade (b), and if he does so and acts *bonâ fide* and with ordinary diligence he will not be responsible for any loss which happens.

Duty to act according to usage of trade.

If the agent is a servant of his principal, and has engaged to devote the whole of his time and services to his employer, he will not be able to sue for services which he has rendered to a third person while in his master's employ, as the remuneration will belong to his master (c). Lord Ellenborough therefore held a ship's captain could not sue for the price the third party had agreed to pay for his personal services.

If whole time principal's, cannot sue for services rendered to other parties.

It is the duty of an agent not only to account to his principal, but also to hand over any profits which he may have made in the course of his principal's business.

Duty to hand over profits.

Cockburn, L. C. J., says, in *Morison v. Thompson* (d), “In our judgment the result of these authorities is, that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is, at the same time, a duty—which we consider a

(z) *Per Mellish, L. J., Ex parte White, Re Nevill* (1871), 6 Ch. 397.

(a) *Clarke v. Tipping* (1846), 9 Beav. 284.

(b) *Russell v. Hankey* (1794), 6

Term R. 12; *Comber v. Anderson* (1808), 1 Camp. 523.

(c) *Thompson v. Havelock* (1808), 1 Camp. 527.

(d) (1874), L. R. 9 Q. B. 486.

legal duty—clearly incumbent upon him, whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer.”

Interest on principal's money belongs to him.

Interest made by an agent of his principal's money belongs to the principal, and may be recovered by him in an action for money received (*c*).

Duty usually to act in principal's name.

An ordinary agent should not sell in his own name, though he may if he is a factor (*f*).

Chief Justice Abbott says: “The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of the circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different position: he is not trusted with the possession of goods, and he ought not to sell in his own name. The principal has a right to expect that he will not sell in his own name.

Agent ought to have no interest adverse to principal.

An agent ought not to have any interest adverse to his principal, and if he has cannot bind such principal.

An agent to buy for himself, holds property as trustee for principal.

In *Lees v. Nuttall* (*g*), the agent to buy a property for his principal bought it for himself, and the Court ordered him to hold it as trustee for his principal.

In another case (*h*), where the principal had employed the plaintiff as his agent to sell some land at 10s. a yard, and the plaintiff did so, to a company in which he held shares, the Court of Exchequer refused to admit that the agent had

(*c*) *Rogers v. Bochm* (1799), 2 Esp. 702.

(*f*) *Baring v. Corrie* (1818), 2 B. & Ald. 143.

(*g*) (1289), 1 R. & M. 53.

(*h*) *Salomons v. Pender* (1865), 3 H. & C. 639, 645.

any claim to commission, although the principal elected to abide by the sale; and Baron Martin quoted Story on "Agency," where he says, "agents cannot act so as to bind their principals where they have an adverse interest in themselves;" and the learned Baron continued: "This rule is founded upon the plain and obvious consideration that the principal bargains in the employment for the exercise of the disinterested skill, diligence and zeal of the agent for his own exclusive benefit."

Lord Wynford, in giving judgment (*i*) in the House of Lords, said: "I take it to be a general principle of law and equity that a man cannot be a seller for one and a buyer of that property himself. . . . If any man who is to be trusted places himself in a condition in which he has an opportunity of taking advantage of his employer, by placing himself in such a situation, whether acting fairly or not, he must suffer the consequence of his situation." [Here all the transactions were set aside.] "Such is the jealousy which the law of England entertains against any such transactions."

In *Gillett v. Peppercorn* (*k*) the broker, who had been employed to buy shares, sold to his principal his own shares. Lord Langdale, in setting the transaction aside, said: "If a person employed as an agent on account of his skill and knowledge is to have in the very same transaction an interest directly opposite to that of his employer, it is evident that the relation between the parties then becomes of such a nature as must inevitably lead to continued disappointment, if not to the continued practice of fraud."

Sir Richard Arden laid down the same principle equally clearly in *Massey v. Davies* (*l*):—"Where a man undertakes to buy for me in the most beneficial manner what my colliery shall want, can it be possible that I can trust him

(*i*) *Rothschild v. Brookman* (1831),
5 Bligh, N. S. 165, at p. 192.

(*k*) (1839), 3 Beav. 78.
(*l*) (1794), 2 Ves. Jun. 317.

to sell those articles to me himself? The clearest evidence is necessary to show consent. It is opening a door to monstrous fraud."

Duty to disclose any interest.

If an agent has any interest in the subject-matter of the agency, he is bound to disclose to his principal not merely the fact that he has an interest, or to make such statements as will put the principal on inquiry; but he is bound to disclose the exact nature of his interest, and the burden of proof that he has done so lies on him (*m*).

Gray v. Hargis
207 Mass. 219.

In *Kimber v. Barber* (*n*) an agent agreed with his principal to obtain him shares in a company at 3*l*. per share. The agent then procured the shares for 2*l*. for himself, and sold them to his principal at the agreed sum. Lord Selborne ordered him to refund to his principal 1*l*. per share. An agent is, however, not bound to account for profits he made before he became agent, although made out of the person who afterwards became his principal. Thus, where a promoter of a company had contracts with the firm which it was proposed to make into a company, he was only held liable to account for profits he made on the contracts made after the date of the incorporation of the company, and not profits on those made before (*o*).

Only applies to profits in agency.

An agent employed to sell for different persons ought to keep separate accounts for each principal.

If fails in effecting object of agency, duty to inform principal.

If an agent cannot make the contract, or get the goods the principal has commissioned him to buy, it is his duty to inform him as soon as possible (*p*). Thus, where agents were commissioned to buy opium in India of a particular quality, and it could not be procured, it was held to be their duty to inform the principal, and that they were liable for any damage resulting to him from their not having done so.

(*m*) *Burdick v. Garrick* (1870), 5 Ch. Ap. 233. See also *Dunne v. English* (1874), 18 Eq. 523, at p. 533; *De Busche v. Alt* (1878), 8 C. D. 286. (*n*) (1873), 8 Ch. Ap. 56.

(*o*) *Albion Steel Wire Co. v. Martin* (1875), 1 C. D. 580.

(*p*) *Cassaboglou v. Gibbs* (1883), 11 Q. B. D. 797; *Cullandar v. Oelrichs* (1838), 5 Bing. N. C. 58.

If, however, the principal does not pay the agent himself, but allows the agent to be paid by a commission or percentage from other persons, he cannot claim that payment as a secret profit which is due to him. This is equally true whether the principal knows or does not know of the custom. Lord Justice Mellish said (*g*): "If a person employs another who he knows carries on a large business to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and, in fact, knows he is not to be remunerated by him, but by other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the cost is, he must allow the ordinary costs which agents are in the habit of charging." See also *Baring v. Stanton* (*r*).

Agent entitled to commission from third party if not paid by principal.

If an agent received money for his principal, it ought to be deposited in the name of the principal, and not in his own name at a banker's (*s*).

Principal's money ought not to be deposited in agent's name.

A receiver was, therefore, charged with a loss by the failure of the banker, having made remittances to his own credit and use, and not to a separate trust account (*t*).

If so deposited, responsible for loss.

It is the duty of an agent to keep his principal apprised of all his doings, and give notice of all facts which it may be important for his interests to know. Thus, it is the duty of captains and ship-agents to keep their employer duly informed of all casualties encountered by the ship (*u*), and if they do not perform the duty faithfully it vitiates the contract of insurance he may make, whether they wilfully or unintentionally fail in their duty to their employer (*x*). And when an agent to insure contracts with the third party for an insurance, he does so on the

Duty of agent to keep principal informed as to agency affairs.

(*g*) *Great Western Insurance Co. v. Cunliffe* (1874), L. R. 9 Ch. 525. Ves. 377.

(*r*) (1877), 3 C. D. 505. (*u*) *Per Lord Watson in Blackburn v. Vigors* (1887), 12 Ap. Cas. 531.

(*s*) *Massey v. Banner* (1820), 1 J. & W. 241.

(*x*) See also *Proudfoot v. Montefiore* (1867), L. R. 2 Q. B. 511.

(*t*) *Wren v. Kirton* (1805), 11

footing that every material circumstance within his personal knowledge is to be disclosed, whether known to the principal or not (*y*).

Duty of captain to protect goods shipped.

There is a duty on the master of a ship, as representing the owner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practicable under all the circumstances, to check and arrest the loss and deterioration resulting from accidents; although the shipowner is not liable for the necessary and immediate consequences, owing to the exceptions in the bill of lading. For the neglect of this duty by the master the shipowner is liable to the shipper (*z*).

Duty of bill-broker.

A person to whom a bill is remitted on commission as a bill broker ought first to endeavour to procure acceptance; secondly, on refusal, to protest the bill for non-payment; thirdly, to advise any third person who is concerned. To what extent he will be obliged to do these things depends on the usage of the trade (*a*).

Duty of managing owners.

A paid agent is bound to discharge all those duties, multifarious or other, which the terms of the agency cover. It is one of the duties of managing owners to procure charters, and therefore they are not entitled to make any charge or commission in respect to such work (*b*).

Duty of solicitors.

Lord Westbury, in *Tyrell v. Bank of London* (*c*), said: "The relation of solicitor and client involves, of course, the relation of principal and agent. The duties of the first include all those of the second, and something more. A solicitor shall not in any way whatever, in respect of the subject of any transactions, in the relations between him and his client, make gain to himself at the expense of his client

(*y*) See *Blackburn v. Vigors*, *ubi supra*; *Blackburn v. Haslam* (1888), 21 Q. B. D. 144.

(*z*) *Atlantic Mutual Insurance Co. v. Huth* (1881), 16 C. D. 474.

(*a*) Beawes, *Lex Merc.* p. 430; Story, § 209.

(*b*) *Williamson v. Hine*, (1891) 1 Ch. 390.

(*c*) (1862), 10 H. of L. C. 39.

beyond the cost of his just and fair professional remuneration to which he is entitled." In this case a solicitor, whose duty it was to advise his clients—a bank—allowed them to purchase certain premises in which he was jointly interested without telling them he was so interested, and he made a profit on the purchase. Lord Westbury, in ordering him to stand trustee for the amount of his profit for the bank, said : "In my view, it is only necessary to ascertain that at the time the solicitor agreed to take from Mr. Read (the other person who was jointly interested) one-half of his purchase, he (the solicitor) was acting in the capacity of solicitor to the bank, and that he had advised, or intended to advise, his clients to purchase that part of the property which was ultimately bought by his clients. It is, I think, immaterial whether a solicitor had before his contract advised his client to buy, and the client had agreed to act under such advice, or whether the solicitor intended only to give such a recommendation, if in the result we find the client buying the property whilst under the advice of the solicitor."

CHAPTER IX.

RIGHTS OF THE PRINCIPAL AGAINST HIS AGENT.

Remedies of
principal.

WE have now considered the duties of the various kinds of agents towards their principals, and propose, in the present Chapter, to consider the rights and remedies of the principal against his agent, if he either neglects those duties, travels outside of them, or acts in breach of good faith towards his employer.

Breach of
contract.

If the agent does not carry out the instructions of the principal, the first remedy the principal has is an ordinary action for breach of contract. Thus, where an agent, in breach of his instructions, handed over goods of the principal to a third party before they were paid for, the Court held that he was liable to compensate the principal for their value (*a*).

If agent make
an unenforce-
able contract,
the principal
can recover
money paid to
agent.

The agent ought to make a contract which the principal can sue on and enforce. If he makes one which the principal cannot enforce, the principal can recover any money back which has been paid the agent in the belief that the agent had made the contract as directed. So it was held (*b*) that where the principal told his agents, some cotton brokers, to buy him fifty bales of cotton, and they bought instead 300, being employed by other persons, and intending to appropriate fifty of them to the principal, the Court held that the agents were bound to return the 800*l.* paid on account of them. Baron Martin, in giving judgment,

(*a*) *Stearns Co. v. Heintzmann*
(1864), 17 C. B. N. S. 56; *Brown*
v. Boorman (1844), 11 Cl. & Fin. 1.

(*b*) *Bostock v. Jardine* (1860), 3
H. & C. 700.

said: "It is clear that there was no such contract as the defendants (the agents) were authorized to make, because the contract which they made through Messrs. Marriott & Co. was a contract for 300 bales of Surat cotton. Suppose the defendants had become bankrupt, and the plaintiff had attempted to enforce the contract against Messrs. Marriott, I think he would have failed at common law, because there was no contract for a purchase of fifty bales of cotton, but a contract to purchase 300; but even assuming that the plaintiff could have sued upon the contract at common law, it is evident that under the 17th section of the Statute of Frauds he must have failed. Therefore the defendants never gave the plaintiff any consideration whatever for the money, because no contract was ever made by the defendants as the plaintiff authorized them to make."

Where the agent violates his duties or obligations to his principal, he is bound to indemnify the principal, whether the loss arises to the principal through damage to his own property or from the fact that he has to compensate a third party for negligence or acts of his agent (*c*). Thus, if the agent was instructed to negotiate a sale only for ready money, and he allows the principal to deliver the goods without their having been paid for, he is liable for any loss that results from so doing (*d*).

Mr. Justice Grove said, in *Lilley v. Doubleday* (*c*): "If a bailee elects to deal with property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except when the risk is independent of his acts and interest in the property itself." And so, in another case, it was held that where trustees had been negligent they must be held responsible for any loss in any way to the property; for, whatever might be the

(*c*) Story, sect. 217 *c*; *Cassabog-
lou v. Gibbs* (1883), 11 Q. B. D.
797.

(*d*) *Kidd v. Hore* (1884), 2 Times,

141.

(*c*) (1881), 7 Q. B. D. 510. See
also *Davis v. Garratt* (1830), 6 Bing.
716.

Agent bound,
if he violates
his duty, to
indemnify
against con-
sequences.

immediate cause, the property would not have been in a situation to sustain that loss if it had not been for their negligence (*f*).

Sufficient if
damage
natural result.

The loss or damage need not be directly or immediately caused by the act which is done or omitted to be done. It will be sufficient if it be fairly attributable to it as a natural result or a just consequence. But it will not be sufficient if it be merely a remote consequence or an accidental mischief, for in such a case, as in many others, *causa proxima non remota spectatur*. It must be a real loss or actual damage, not merely a probable or possible one. Where the breach of duty is clear, it will be presumed that the party has sustained a nominal damage (*g*).

Not bound to
indemnify if
loss merely
possible.

Amount of
damages.

The damages may vary according to the time when the action is brought; for instance, if the neglect of duty is non-insurance, they may vary from a nominal sum, where the thing which ought to have been insured can still be insured at the same rate, up to the amount of the value of the property, less the premiums, when the loss has happened (*h*). So, where the agent had not invested funds of his principal in paper and tiles, as directed, but altogether in paper, the Court held the measure of damages was the price of tiles at the port of destination, but not the profits that might have been made on them (*i*). Where an agent is directed to invest by his principal in a particular stock, and he does not do so, and the stock rises, the principal is entitled to recover the increased value; and if the agent improperly withholds money of the principal, he is liable for interest and the expense of remitting it; but he is not responsible for remote consequences, such as loss of credit or suspension of business, caused by the delay (*k*). So, if

Agent failing
to hand over
money is
liable for
amount and
interest, not
loss of credit
arising to
principal.

(*f*) *Caffray v. Darby* (1801), 6 Ves. 490, at p. 495.

(*g*) Story on Agency, sect. 217 c.

(*h*) *Charles v. Altin* (1854), 15 C. B. 46; see judgments of C.J. Jervis and Mr. Justice Maule.

(*i*) *Bell v. Cunningham* (1830), 3 Peters, 69; Mayne on Damages, 4th ed. p. 513.

(*k*) *Short v. Skipwith*, 1 Brock. Cir. 103; Story on Agency, sect. 220.

the agent has bought goods for the principal of a description he was not authorized to buy, and has been paid for them, the principal can recover from the agent the price he has paid for them, and any loss he may have sustained by the breach of duty; such, for example, as having had to compensate a customer for the difference in quality, and all incidental expenses he may have been put to. The principal cannot, however, recover from the agent the profits he would have earned if the agent had fulfilled his contract (l). For although a commission agent abroad is bound to pay the foreign seller for the goods, and is therefore in the position of a quasi vendor for the purpose of stoppage *in transitu*, he is not so for the purpose of damages.

If the agent can, however, show that no benefit could possibly under any circumstances have accrued to the principal by his order having been obeyed, the principal will have no right of action; *a fortiori*, where the principal would have sustained a loss or damage if his orders had been obeyed (m); but as long as damage might have resulted, though no damage actually is done, the principal has a right to nominal damages (n). But if no loss could have happened to the principal by the neglect of the agent, as if he did not insure when the principal had no insurable interest, the agent is not liable. Although the agent may have disobeyed his principal's orders and not insured the ship, he is not liable for such disobedience if the insurance would have been useless, as where the ship had deviated from her voyage, or the voyage was illegal; the damage must be the necessary result of the agent's neglect of duty (o).

If no damage could result from violation of duty, agent not liable.

If the agent effects an improper insurance, or one without a proper deviation clause, he will be liable to make good

Agent liable for negligence.

(l) *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797.

(m) Mayne on Damages, 4th ed. p. 515.

(n) *Marzetti v. Williams* (1830), 1 B. & Ad. 427; *Van Wart v. Woolley* (1830), 1 M. & M. 520.

(o) *Webster v. De Tastet* (1797), 7 T. R. 157.

the loss to the principal (*p*). As to what skill he ought to show, see *Chapman v. Walton* (*q*), where it was held that the skill required from the agent was that which other persons exercising the same profession or calling, and being men of experience and skill therein, would have shown, and whether the agent acted rightly or wrongly depended on whether such persons would have come to the same conclusion; for instance, an agent is liable for a loss occurring to the principal through his accepting a cheque in payment when he ought to have taken cash only (*r*).

Agent not liable where loss occurred through a mistaken but not wrong exercise of judgment.

But where a loss occurs to a principal, not through negligence or fraud, but which might have been avoided if the agent had done the work in a different way, he is not liable, provided he has acted to the best of his judgment; as where an agent might have insured a cargo without a particular average clause, and so prevented his principal suffering any loss, but had been given no instructions how to insure her (*s*).

Paid agent must exercise care of skilled person.

A person who undertakes to do some work for reward must exercise the care of a skilled person, and the absence of care in him is negligence (*t*). Thus, if a client is compelled to pay off an incumbrance owing to his solicitor's negligence in examining the title, the solicitor will be liable (*u*).

If authorized to do imprudent act, not liable for consequences. Damage must be necessary result.

If the agent is authorized to do an act which is in itself an imprudent one, and which the principal ought never to have authorized to be done, the agent cannot be made liable when loss is occasioned by his having done it (*v*). The agent is only liable for the damages which necessarily resulted from his negligence or disobedience of orders. Thus, where an agent did not give the information he

(*p*) *Mallough v. Barber* (1815), 4 Camp. 150; *Park v. Hammond* (1816), 4 Camp. 344.

(*q*) (1833), 10 Bing. 57.

(*r*) *Papé v. Westacott* (1893), 10 Times, 51.

(*s*) *Moore v. Morgue* (1776), Cowp. 479.

(*t*) *Grill v. Gen. Iron Screw Col. Co.* (1868), L. R. 3 C. P. 476; (1866), L. R. 1 C. P. 600, at p. 612.

(*u*) *Whitman v. Hawkins* (1869), 4 C. P. D. 13.

(*v*) *Per Lord Chelmsford in Overend, Gurney & Co. v. Gibb* (1872), L. R. 5 H. of L. 480.

ought to have given to the underwriter in effecting an insurance, and the insurance was bad, it was held that the principal could not recover both the amount of the policy and the costs of an unsuccessful action against the underwriter, but only the amount of the policy, unless he could show that the agent wished him to bring the action against the underwriter (*y*).

The agent may also be sued in tort, for wherever there is a contract and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract (*z*).

If the principal has not undertaken to pay the agent he cannot bring an action against him for not doing what he undertook to do. Common carriers and porters are in a different position, because they are entitled by law to recompense. No action lies for the non-performance of work where there is no consideration, unless there is a custom or legal obligation to compel a person to do the work, in which case there is a corresponding liability to pay for it without any express undertaking to pay. But an action lies against a gratuitous agent in the same way as against any stranger for misfeasance or performing the work badly (*a*). But a barrister, whose office is purely honorary and gratuitous, cannot be sued even for doing work badly. Thus, Lord Kenyon held he could not be held liable for unskilfully and negligently settling a bill (*b*); nor can an action be brought against counsel to recover a fee given to him for arguing a case if he neglects to do so and does not attend the hearing (*c*).

Principal may sue agent in tort.

Gratuitous agent not liable for non-performance.

(*y*) *Seller v. Work* (1801), Marshall on Ins. 4th ed. p. 243.

(*z*) *Per* Lord Campbell, *Brown v. Boorman* (1845), 11 Cl. & Fin. 1.

(*a*) *Else v. Gutward* (1793), 6 T. R. 143.

(*b*) *Fell v. Brown* (1795), Peake, 96; *Perring v. Rebutter* (1837), 2 M. & Rob. 429.

(*c*) *Turner v. Philips* (1795), Peake, 122; see also *Mullan v. M'Donagh, Q.C.* (1860), 5 Ir. Jur. N. S. 101; 2 L. T. N. S. 136.

Generally gratuitous, agent only liable for bad faith.
 Liable for conversion of principal's property.

Interest, when agent liable for.

Trustee.

Commercial agent.

Nor is a gratuitous agent liable in the same way as a skilled person; he is only liable if he acts with want of good faith, and if he acts in such a way as would be careless in a person in his position (*d*). But acting in good faith will not protect a gratuitous agent if he hands over property of the principal to a third party without authority, for then he will become liable for conversion (*e*).

Interest made by an agent of his principal's money belongs to the principal, and may be recovered by him in an action for money had and received (*f*). Even if the agent only keeps his principal's money in his possession and does not use it, he is liable for interest, unless there was some reason for doing so (*g*); *a fortiori* if he chooses to employ it for his own purposes, in which case he will be either charged interest at a higher rate or the principal can claim what profit the agent made on it (*h*).

The above cases were cases in which executors kept money without paying it over, and were decided by Lord Loughborough in 1792 and 1784 respectively. Lord Ellenborough, however, in an action against a commercial agent, held (*i*) that to establish a claim to interest upon money of the principal in the agent's hands, it was necessary that there should be either a specific agreement to that effect or something should appear from which a promise to pay interest might be inferred, or else proof should be given that the money, in fact, had been or was being used. Lord Chelmsford, in *Turner v. Burkinshaw* (*j*), seems to think that a demand is enough to make interest payable from the date of the demand. This seems the more consonant rule to ordinary practice. He says, "If no demand is made upon the agent it is a simple case of an

(*d*) *Shiels v. Blackburne* (1789), 1 H. Bl. 159.

(*e*) *Williams v. Shee* (1813), 3 Camp. 469.

(*f*) *Rogers v. Boehm* (1799), 2 Esp. 702.

(*g*) *Franklin v. Frith* (1792), 3 Brown, C. C. 433.

(*h*) *Treves v. Townshend* (1784), 1 Brown, C. C. 384.

(*i*) *Havilland v. Bowerbank* (1807), 1 Camp. 49.

(*j*) (1867), 2 Ch. Ap. at p. 492.

agent retaining money which he ought to pay over, but which he has not been required to pay; and there is no case of which I am aware where, under such circumstances, without any more, the agent has been made to pay interest."

Lord Hatherley made a solicitor who had been acting as agent pay five per cent., as there was evidence that he had used it in his business; there being no evidence he had made more on it (*k*).

Solicitor-agent.

It seems where an agent, all of whose time belongs to the principal, earns money from a third party, that money belongs to the principal (*l*); and if he makes a bargain with the third party so that he will also receive pay for his services and some of the profits belong to him, he cannot sue for it, as it is the principal's, and the Court regards such an arrangement as tending to prevent him acting to the best of his abilities for his principal (*m*).

Principal can sue agent for money earned in employ of third party.

The agent is not allowed to make a secret profit out of his principal; and if the principal authorizes him to pay a certain price for goods or shares, and he gets them cheaper, the agent is not allowed to pocket the difference; but the principal can recover the profit either in an action for money had and received (*n*), or else on the Chancery side by obtaining a declaration ordering the money to be paid over to him. The same principle applies to company promoters; but a person who has been supplying goods to a firm before it was turned into a company, and making a profit, will not, by becoming a director and promoting the company, be obliged to account for the profits made on contracts which were entered into before the company was formed and continued by them, but only on those entered into after the incorporation (*o*).

Principal can sue for agent's secret profit as money had to his use.

(*k*) *Burdick v. Garrick* (1870), 5 1 Camp. 527; *Diplock v. Blackburn* (1811), 3 Camp. 43.

(*l*) *Dennis v. Barber* (1703), 6 L. R. 9 Q. B. 480.

(*m*) *Thompson v. Havelock* (1808), 1 C. D. 580.

(*n*) *Morison v. Thompson* (1874),

(*o*) *Albion Steel and Wire Co. v. Martin* (1875), 1 C. D. 580.

Agent not
liable for
profit in
certain cases.

A commission agent who sells goods for his principal will have to account for the proceeds of the sale; but if for some reason, as owing to the difficulty of exchange, while crediting the principal with the money, he actually uses it to buy goods and sends them home, he is not accountable to the principal for any profits he may make on them (*p*).

Principal's
right to dis-
miss agent.

If an agent takes a commission from a third party it entitles his principal to dismiss him, and if the principal dismisses him for a cause he cannot substantiate, and then discovers the agent has taken a commission, that will justify the previous dismissal (*q*). Lord Justice Cotton said: "If a servant or a managing director, or any person who is authorized to act and is acting for another in the matter of any contract, receives as regards the contract any sum, whether by way of percentage or otherwise, for the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and in my opinion it is sufficient to show that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He has a temptation, especially where he is getting a percentage on expenditure, not to cut down the expenditure, but to let it be increased, so that his percentage may be larger. I do not, however, rely upon that; but what I say is this, that where an agent entering into a contract on behalf of his principal, and without knowledge or assent of the principal, receives money from the person with whom he is dealing, he is doing a wrongful act; he is misconducting himself as regards the agency, and, in my opinion, gives to his employer, whether a company or an individual, and whether the agent be a servant or a managing director, power and authority to dismiss him from his employment

(*p*) *Kirkham v. Peel* (1880), 43 L. T. 171; affirmed on appeal (1881), 44 L. T. 195.

(*q*) *Boston Deep Sea, &c. Co. v. Ansell* (1888), 39 C. D. 339, at p. 357.

as a person who by that act is shown to be incompetent of faithfully discharging his duty."

In the Court below, Mr. Justice Kekewich had held that, as only an isolated act, the company had no legal right to dismiss their managing director, and it was also urged that it happened long ago. As to this, Lord Justice Cotton said: "It was urged before us that it was a long time ago, and it was said, Suppose this happened eight years ago—supposing the act had been done eight years ago—would that in law have justified the employer in discharging him? In law, I say yes. It is very true that if an employer was a reasonable man, and found that a servant who had served him faithfully some eight years had in the early time of his employment done an act which was wrongful and justified his dismissal, probably he might have said: 'This is a man who has been in my employ for years, and he has always behaved himself honestly in the discharge of his duties except in regard to this one transaction which took place such a long time ago, and therefore I do not insist upon my legal right.' But although a man would ordinarily act in that way, yet, in my opinion, that has no effect on the question whether the act is not of such a character as to justify the employer in dismissing him when he finds it out." Of course, if he knows of the act, and still continues to employ him, it might be held to be condoned.

One act of dishonesty sufficient.

The principal has a right to interest on all moneys so obtained from the time the agent received them, at the rate of five per cent. per annum (*v*).

The rate of interest principal entitled to.

If the agent, however, is not remunerated by the principal for his work, but gets his remuneration from the third party by bringing the principal's work to him, the principal cannot recover this money. Lord Justice Mellish thus states the principle: "If a person employs another, who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not

Where principal does not pay, agent cannot recover secret profit.

(*v*) *Boston Deep Sea Fishing Co. v. Ansell* (1888), 39 C. D. 339, at p. 353.

choose to ask what his charge will be, and in fact knows he is to be remunerated not by him but by other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging” (*s*).

Principal can have agent for purchase violating duty declared trustee.

Where an agent employed to purchase an estate instead of buying for the principal buys for himself, the principal can have him declared trustee for him (*t*); and where the agency extends only to part of the lands included in a purchase, and there is uncertainty as to which were intended, a reference may be directed to ascertain them, and also the price to be paid (*u*). A person acting as agent for another who has an interest in a lease cannot renew it for his own benefit (*v*).

Principal has right against agent either to his goods or to follow the proceeds of them.

Both at common law and in equity the principal has a right as owner of property to follow it or its produce into the hands of any person into whose possession he can trace it: unless the principal is estopped from doing so by having held out the person who has dealt with the property as the owner, or the party in possession is protected by the Factors Acts. If the agent is in a fiduciary position (*x*), the principal can in equity, if the sale was rightful, take the proceeds of the sale if he can identify them. If the sale was wrongful, he can still take the proceeds, in a sense adopting the sale for the purpose of taking the proceeds if he can identify them. There is no distinction between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. It very often happens that the principal can-

(*s*) *Great Western Insurance Co. v. Cunliffe* (1874), 9 Ch. Ap. 525; see also *Baring v. Stanton* (1876), 3 Ch. Div. 502; *Williamson v. Barbour* (1878), 9 C. D. 529.

(*t*) *Lees v. Nuttall* (1829), 1 Rus. & My. 53.

(*u*) *Chattock v. Muller* (1878), 8 C. D. 177; and see the cases re-

ferred to in *Fox v. Mackreth* (1788), W. & T. L. C. Eq.

(*v*) *Edwards v. Lewis* (1747), 3 Atk. 538; and see *Keech v. Sandford* (1726), and cases there collected, W. & T. L. C. Eq.

(*x*) *New Zealand Land Co. v. Watson* (1881), 7 Q. B. D. 374, per L. J. Bramwell, at p. 382.

not identify the proceeds, as they may have been invested together with the fiduciary agent's in a purchase: as, for instance, in land or chattels. If the purchase is clearly made with the principal's money, he has a right to elect either to take the property purchased or to hold it as a security for the amount of his money laid out in the purchase. If the fiduciary agent has mixed his principal's money with his own money in making the purchase, the principal has a right to a charge on it for the amount of his money which the agent had in his hands, provided a substantial amount of it has been thus invested, absolutely independent of the fact what the actual amount thus invested by the agent was (*y*).

There is no distinction in equity between an express trustee or an agent, or a bailee, or a collector of rents, so far as regards the right of the beneficial owner to follow the proceeds. Their rights are founded on the same principles because the beneficial ownership is the same wherever the legal ownership may be. Thus, if goods are bargained and sold to a man upon trust to sell and hand over the proceeds to another, that other is the beneficial owner. If instead of being bargained and sold, so as to vest the legal ownership in the trustee, they are deposited with him to sell as agent, so that the legal ownership remains in the beneficial owner, the rights of the beneficial owner are the same in both cases (*z*).

No distinction in equity between express trustee and agent.

If the agent has acted with want of good faith to his principal, either by concealing some material fact, as if he is an agent to buy, he sells his own property without saying it is so, or by making a secret profit, the principal can, at his option, elect to take the property and pay no more for it than the agent has paid, or else rescind the contract.

Agent acting fraudulently, principal right to elect to rescind contract or take secret profit.

In the case of *The Emma Silver Mining Co. v. Grant* (*a*),

(*y*) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 C. D. 696; 42 L. T. N. S. 421.

(*z*) *Knatchbull v. Hallett* (1880), 13 C. D. 696.
(*a*) (1879), 11 C. D. 918.

one of the promoters took a secret profit of 20 per cent. on the capital. In an action by the company against him he was obliged to repay and ordered to be accountable for it to the company. In his judgment, Sir George Jessel quotes Lord Justice James with approval, as follows:—
 “A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I see no difference in this respect between a promoter and a trustee, steward or agent.”

When fiduciary relationship commences.

There have been some cases (*b*) in which a distinction has been made between persons who have bought outright a property and then re-sold it afterwards at a profit to the company of which they were promoters, on the ground that at the time of their original purchase they were not agents of the company or in a fiduciary position towards it, and that, though they ought to have disclosed their interest, yet, as the company was unable or unwilling to ask for rescission of the contract, the company had no right to ask such promoters to repay it the profit obtained on the re-sale. These cases seem to be at variance with the principle that the principal has the option of either rescinding the contract or taking the property at the price at which the agent obtained it, and also to open the door to fraud on the part of agents.

Lord Justice Lindley's opinion.

Lord Justice Lindley, in his book on Companies (*c*), says: “The distinction here (*i.e.*, in the above cases) drawn between a company contemplated by the buyers, but not yet in process of formation, and a company the formation of which has commenced, is very fine; the more so as it has been conceded that the company ultimately formed may

(*b*) *Cape Breton Co.* (1884), 26 C. D. 221; *Ladywell Mining Co. v. Brookes* (1887), 35 C. D. 400.
 (*c*) Lindley on Companies, 359.

have been very different from that the promoters were endeavouring to form when they became purchasers themselves;" and he adds, "Notwithstanding the present state of the authorities, the writer ventures to submit that it is a breach of duty on the part of the seller to the company, and it is the resulting application of the company's money which gives rise to the right to relief in these cases; and he submits that when a promoter sells his own property to a company at a profit, without disclosing the fact that what he is selling is his property, the company can, at its option, either rescind the sale or keep the property, paying only its fair value, and such further allowances, if any, as may be just, and recovering back from the promoter the difference between such value and the allowances, if any, and the sum he has managed to extract from the company."

As has been pointed out in the Chapter on "The Duties of an Agent," the agent is bound to disclose not merely the fact that he has an interest in the subject-matter of the agency, but to disclose the exact nature of his interest, and the burden of proof that he has done so lies on him (*d*). Thus, where the principal brought an action to recover the extra profit made by the agent, Sir George Jessel said (*e*): "It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase; he must tell him all the material facts. He must make a full disclosure," and then quotes Lord St. Leonards' judgment in *Murphy v. O'Shea* (*f*): "If, in a transaction between principal and agent, it appears that there has been any underhand dealing by the agent, *ex. gr.*, that he has purchased the estate of the principal in the name of another person instead of his own, however fair the transaction may be in other respects, it has no

Agent's duty
to disclose
exact nature
of interest.

(*d*) *Burdick v. Garrick* (1870), 5 Ch. Ap. 241.

(*e*) *Dunne v. English* (1874), 18 Eq. 524, at 533.

(*f*) (1845), 2 J. & L. at p. 422.

validity in a Court of Equity." Sir George Jessel then goes on: "Now, what is the meaning of knowledge which he himself possessed? Full disclosure of that he knows. Is it sufficient to say that he has an interest? Is it sufficient to put the principal on inquiry? Clearly not."

Where agent has not disclosed interest, principal has right of action, unless acquiescence or accord and satisfaction proved.

The agent may set up that the principal has ratified or adopted what has been done after learning the true facts, or else that the principal, knowing the facts all along, acquiesced, and is therefore estopped from complaining; but the onus lies on the agent of proving this. As the principal has a right of action, the agent must show that the principal is estopped, or else must prove something in the nature of accord and satisfaction.

In *De Bussche v. Alt (g)*, Lord Justice Thesiger says: "It is competent, no doubt, to a principal to ratify or adopt the act of his agent in purchasing that which such agent has been employed to sell, and to give up the right which he would otherwise be entitled to exercise of either setting aside the transaction or recovering from the agent the profits derived from it, and the non-repudiation for a considerable length of time of what has been done would at least be evidence of ratification and adoption, or might possibly, by analogy to the Statute of Limitations, constitute a defence; but before the principal can properly be said to have ratified or adopted the act of his agent, or waived his right of complaint in respect of such acts, it should be shown that he has full knowledge of its nature and circumstances; in other words, that he has had presented to his mind proper materials upon which to exercise his power of election, and it by no means follows that because . . . he does not repudiate the whole transaction after it was completed, he has lost a right actually vested in him to profits derived by his agent from it." To estop the principal complaining, he must have

stood by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed.

When once the wrongful act has been done, without knowledge or assent of the principal, the matter is to be determined on many different legal considerations. A right of action has been vested which cannot be divested without accord and satisfaction or release under seal. Even an express promise not to take legal proceedings would not constitute a bar to an action, for the promise would be without consideration, and therefore not binding (*h*).

In an action between principal and agents impeaching the agents' account, actual knowledge of antecedent fraud in the agents by one who subsequently became a member of the firm of the principal will not be a good plea in bar of a claim for an account (*i*).

An agent cannot dispute the title of his principal unless he does so on the authority and right of a person having a superior title to his principal. In *Dixon v. Hamond* (*k*) an agent insured a ship, and accounted for premiums on behalf of and to a partnership, although the ship belonged only to one of the partners. On the ship being lost, and the other partner suing the agent for the insurance money which he had received, the agent tried to set up that such other partner had no interest in it. Chief Justice Abbott, in giving judgment, said: "The right of the plaintiff to recover here depends on a settled rule of law, that an agent shall not be allowed to dispute the title of his principal, and, receiving money in that capacity, afterwards say that he did not do so, and did not receive it for the benefit of his principal, but for that of some other person. Here the defendant has received the money as agent for the

Agent cannot dispute principal's title.

(*h*) See *per* Lord Justice Thesiger, *De Bussche v. Alt*, *ubi supra*, p. 314.

(*i*) *Williamson v. Barbour* (1878), 9 Ch. D. 529.

(*k*) (1819), 2 B. & Ald. 310.

partnership, and he cannot now be permitted to say that he received it for the benefit of Flowerdew alone." See also *Kieran v. Sandars* (l).

Exceptions.

If, however, an agent has received goods to sell from a person to whom they do not belong, and he receives directions from the real owner to hold the money for him, he may set up his title (m). Mr. Justice Blackburn, in delivering the judgment of the Court, said: "A bailee can set up the title of another only if he depends upon the right and title, and by the authority of that person. Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient results." The agent may also set up an adverse title where his principal's possession arose out of fraud (n).

Agent knowing of adverse claim and accepting agency cannot dispute title.

But if an agent, knowing of the adverse title, still chooses to act as agent, he cannot set up the right of the adverse claim as against his principal (o). Lord Justice Lush, speaking of such a person, said: "I am of opinion that when a person in such a position, knowing of two adverse claims to goods, elects to take the part of one of the claimants, and to sell the goods as his, he is estopped from afterwards denying that claimant's title."

In what Court principal's action for account lies.

The principal has a right to an account against his agent (see Chapter on "Duties of Agent"); but prior to the Judicature Acts this right to an account only existed on the Chancery side in two cases: namely, where the relation of principal and agent had imposed a trust upon the agent (i. e., where the agent was in a fiduciary position), or else where the accounts were complicated so that an adequate remedy could not be obtained in the Common Law Courts, which had no machinery for taking complicated accounts (p). There has been held to be no such

(l) (1837), 6 Ad. & Ell. 515.

(m) *Biddle v. Bond* (1865), 34 L. J. Q. B. 137, at p. 140.

(n) *Hardman v. Willcock* (1832), 9 Bing. 382, n.

(o) *Ex parte Davies, In re Sadler* (1881), 19 C. D. 86, p. 93.

(p) *Makepiece v. Rogers* (1865), 34 L. J. Ch. 396; *King v. Rossett* (1827), 2 Younge & J. 33.

fiduciary relationship between the following parties, viz., between master and servant (*q*), between a banker and his customer (*r*); nor does it exist in cases of contract, where the parties have made payments according to the work done (*s*).

At common law there was a writ of account against two kinds of persons, *i.e.*, those standing in a quasi fiduciary position, as farm bailiffs, receivers, executors, and guardians in socage, and by merchant against merchant, judgment being given in the form of the order *quod computit*. A master could also have a writ of account against his servant. The account was taken before auditors appointed by the Court, and then there was final judgment for what was found due. The form of the writ against the former directed the sheriff "that you, justice A., that justly and without delay, he do render to B. his reasonable account for the time in which he was his bailiff in N., and the receiver of the money of him the said B. as he can reasonably show that he ought to render to him, that we may hear no more clamour thereupon for want of justice" (*t*). The writ as between merchants was also directed to the sheriff, and was as follows:—"We command you that you, justice A., merchant, that justly, &c., he render to B., merchant, a reasonable account for the time in which he was receiver of the money of him, the said B., for whatever cause and contract coming to the common profit of the said A. and B., as by the law merchant he can reasonably show that he ought to render him" (*u*). This writ does not seem to be expressly abolished; but by sect. 34, sub-s. 3 of the Judicature Act, "the dissolution of partnerships or the taking of partnership or other accounts," has been assigned to the Chancery Division.

Action for
account at
common law.

(*q*) *Smith v. Lereaux* (1863), 2 D. J. & S. 1.

(*r*) *Foley v. Hill* (1851), 2 H. L. C. 28.

(*s*) *Moxon v. Bright* (1869), 4 Ch. Ap. 292; and see *Makepiece v.*

Rogers (1865), 34 L. J. Ch. 396.

(*t*) Haynes on Equity, 4 Eq. p. 255.

(*u*) Fitzherbert, *Natura Brevium*, 116, R. P.; and see p. 119.

Under Ord. III. r. 8, a writ of summons may be indorsed with a claim that an account may be taken. The forms given under the Act and Daniel's Chancery Forms simply give the endorsement as "The plaintiff claims that an account may be taken of [say what]." In a recent unreported action in the Queen's Bench Division, *Dore v. Hooton* (*w*), the writ was endorsed for an account simply, the plaintiff being the owner, and the defendant the manager of a public-house. It was clear that at the price at which the beer was sold, and from the amount consumed, the defendant ought to have handed over more to the plaintiff; but as the plaintiff had not asked for an account against the defendant on the footing of wilful default, *i.e.*, what he ought to have received, as is usual in the Chancery Division in such a case, the Court of Appeal held that the defendant could not be held liable, except for what he had been shown to have actually received.

*Arbitration
Act, 1889.*

Matters of account may be referred under sect. 14 of the Arbitration Act, 1889 (*x*), which says, "The Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising thereon, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before the special referee or officer of the Court."

Ord. XV. r. 1, evidently contemplates accounts being taken on the Queen's Bench side, since it says "that an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in similar cases, shall be forthwith made." Mr. Justice Field under it ordered an account where it was alleged that the plaintiff and defendant jointly bought some old buildings for the purpose of pulling down and selling the materials (*y*); under which circumstances as appears, from *Moxon v. Bright* and *Smith v. Leveaux*, no order would have been made in the Chancery Division.

(*w*) Hilary Term, 1893, Mr. Arthur Powell was counsel for plaintiff and Mr. A. H. Spokes for defendant.

(*x*) 52 & 53 Vict. c. 49.
(*y*) *York v. Stowers* (1883), W. N. 174.

If the agent has accounted but the principal discovers fraud or errors in the account, it can be opened up. If there is one mistake in the account, the principal is allowed to surcharge or falsify. Where an account is opened up the whole of it may be unravelled, and the parties will not be bound by deductions agreed upon between them on the taking of the former account (z); but where a party has liberty to surcharge and falsify, the *onus probandi* is always on the party having the liberty; for the Court takes it as a stated account and establishes it, but if the party can show an omission for which there ought to be credit it will be added (which is a surcharge), or if any wrong charge is inserted it will be deducted (which is a falsification). This, however, must be done by proof on his side (a).

Principal's rights if agent's account wrong or fraudulent.

Sir George Jessel, in *Gething v. Keightley* (b), laid down the rule as to when liberty to surcharge and falsify a settled account would be given as follows:—"In order to induce the Court to make a decree that the plaintiffs are to be at liberty to surcharge and falsify accounts, it is necessary that there should be established in the progress of the suit some one mistake with respect to an item in the accounts. It is not necessary for that purpose to establish more than one mistake, it being the view of the Court a reasonable inference that if there be one mistake there may be many mistakes, and the plaintiff, therefore, ought to have the liberty of entering fully into those accounts with a view of proving other mistakes."

Right to surcharge or falsify.

Sir George Jessel said (c): "Where an account is between persons in a fiduciary relation, and the person who occupies the position of an accounting party—that is, a trustee or agent—is the defendant, it is easier to open the

When principal has right to open the account. Opening accounts.

(z) *Osborne v. Williams* (1811), 18 Ves. 379, 382.

(a) *Pit v. Cholmondeley* (1754), 2 Ves. Sen. 566; see also *Dan. Ch.*

Practice, 6th ed. p. 485.

(b) (1878), 9 Ch. D. 547.

(c) *Williamson v. Barbour* (1887), 9 C. D. 529.

account than it is in cases where the persons do not occupy that position—that is to say, that a less amount of error will justify the Court in opening the account. Then I have one other observation to make, which is, that where you show a single fraudulent entry in the case of persons occupying the position of principal and agent, or trustee and *cestui que trust*, the Court has actually opened an account extending over a greater number of years and closed for a much longer period than the account I have before me” (viz., extending over nineteen years, and closed for some time; it does not appear from the report how long). “I mean the case of *Allfrey v. Allfrey* (c), before Lord Cottenham. We therefore have this as a sort of guide, without laying down any general rule, because every case must depend on its own circumstances, that where accounts have been shown to be erroneous to a considerable extent, both in amount and in the number of items, or where fiduciary relations exist and a less number of errors are shown, or where the fiduciary relations exist and one or more fraudulent omissions or insertions in the account are shown, then the Court opens the account, and does not thereby surcharge and falsify.”

Principal not
liable to pay
agent if not
kept account.

An agent who ought to keep an account cannot charge the principal for his services if he has not kept one. Lord Eldon held, with respect to a man who had been the auditor, steward, and solicitor of another, as follows: “A man standing in a relation imposing a duty to keep regular accounts cannot be permitted to make a demand for work and labour in that character with reference to which he has kept no account, which is justified by a principle that ought to be loudly published, that a receiver who does not pass his accounts regularly ought not to be allowed any poundage” (d).

Fiduciary
agent cannot

An agent who stands in a fiduciary relation to his prin-

(c) (1849), 1 Mac. & G. 87.

(d) *White v. D. of Lincoln* (1803),
8 Ves. 363, at p. 370.

principal cannot plead the Statute of Limitations against his principal if he has been fraudulent or party to a fraud. Unless, however, there is some abuse of the confidential relation, or some intentional imposition, or deliberate concealment of facts, he is protected (*e*). In *Burdick v. Garrick* (*f*), which was a case in which a solicitor who had a power of attorney from his principal to sell land and invest the proceeds tried to set up the statute, Lord Hatherley, in giving judgment, said: "It would be, indeed, a strange thing if this Court would be obliged to hold that if a person, for instance, were to deposit plate and jewels with his bankers, intending to be absent from home for a great number of years, and those chattels were converted by the bankers to their own use in fraud of the owner, and the owner were to come back after the end of seven or eight years, he is utterly remediless, either in the shape of an action at law or a suit in this Court, because the dealing with his property has been in the nature of an agency. I apprehend that the true rule applicable to these cases is to be found in *Foley v. Hill* (*g*), where it is clearly stated by Lord Cottenham, who distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him in respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him, and his customer does not require from him the very coins or Exchequer bills he deposited with him. But in the present case we have an agent who is intrusted with those funds not for the purpose of being remitted

plead Statute
of Limitations.

(*e*) Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 8 and 12; and see *Dean v. Thwaite* (1855), 21 Beav. 261, and *Lewellin v. Mackworth*

(1740), 2 Eq. Cas. Ap. 579.

(*f*) (1870), 5 Ch. Ap. 233.

(*g*) (1851), 2 H. L. C. 35.

when received to the principal, but for the purpose of being employed in a particular manner in purchase of land and stock, and which moneys the factor or agent is bound to keep totally distinct and separate from his own money, and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see. That being so, the Statute of Limitations appears to me to have no application to the case. . . . I do not say that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply; but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation I think it would be right to say the statute has no application."

In actions for
account
statute runs
from demand.

In a case where the relationship between the agent and his principal is not fiduciary, but the agent is bound to account, as where goods are consigned to a factor for sale on commission, as an action does not lie for not accounting till after a demand of an account, the statute does not begin to run until an account has been demanded. After a reasonable time has elapsed, in the absence of evidence to the contrary, a demand will, however, be presumed (*h*).

Arbitrator not
liable for want
of skill.

There is no right of action against a person who is appointed to act, and is acting, as an arbitrator, for not having exercised reasonable care and skill in coming to a decision; for an arbitrator does not enter into an implied promise to bring to the performance of the duty intrusted to him a due and reasonable amount of skill. It was therefore held that a broker who was alleged not to have exercised reasonable skill in determining whether goods were of the quality contracted for was not liable (*i*).

Principal may
act as factor

If a foreign factor exceeds his authority by buying goods

(*h*) *Topham v. Braddick* (1809), 1 Taunt. 572; see also *Collins v. Benning* (1700), 12 Mod. 444.

(*i*) *Pappa v. Rose* (1871), L. R. 7 C. P. 32 and 525.

he ought not to buy, or buys at a higher price, and the principal has made advances on the goods, the principal has an interest in the goods as security, and may act in respect to them as a factor for the person who broke his instructions. The principal may, as such, insure them, and sell them in the same way as a factor would have been justified in doing (*k*); but he must repudiate the transaction, and give notice of such repudiation within a reasonable time, else he will be held to have adopted it and be liable for any loss. The principal did this in *Cassaboglou v. Gibbs* (*l*), and the Court held he was right in doing so.

for agent who
violates
orders.

In *Smout v. Ilberry* (*m*), it was held that the agent was not liable to a third party if, unknown to him, his authority had been revoked by the death of the principal; and in *Blades v. Free* (*n*), it was held that the estate of the principal was not liable from the time of the death for anything done in pursuance of an authority which had been done since the revocation by death, although it was unknown to both the agent and the third party. But the agent still remained liable to the representatives of his principal for anything done in pursuance of the power after its revocation. Section 26 of Lord St. Leonards' Act (*o*) was passed to protect trustees under such circumstances. This protection was extended to all agents by the 47th section of the Conveyancing Act, 1881, which enacts, "Any person making or doing any payment or act in good faith in pursuance of a power of attorney shall not be liable in respect of a payment or act by reason that before the payment or act the donor of the power had died, or become a lunatic of unsound mind, or bankrupt, or had revoked the power, if the fact of the death, lunacy or unsoundness of mind, bankruptcy, or revocation was not at

Revocation of
principal's
authority by
death.

(*k*) *Cornwall v. Wilson* (1750), 1 Ves. 509.

(*l*) (1883), 11 Q. B. D. 187.

(*m*) (1842), 10 M. & W. 1.

(*n*) (1829), 9 B. & Cres. 167.

(*o*) 22 & 23 Vict. c. 35.

the time of the payment or act known to the person making or doing the same.

“(2) But this section shall not affect any right against the payee of any person interested in any money so paid, and that person shall have the like remedy against the payee as he would have had against the payee if the payment had not been made by him.”

This section applies only to payments and acts made and done after the commencement of the Act (*i.e.*, 31st December, 1881).

Right of
principal to
dismiss
agent.

The principal has a right to dismiss his agent at any time, unless the agency is for a fixed period, the contract of agency being one which is revocable at the will of the principal. (See chapter on “Termination of Agency”) (*p*).

(*p*) *Henry v. Lawson* (1885), 2 Times, 199.

CHAPTER X.

RIGHTS OF AGENT AGAINST THE PRINCIPAL—REMUNERATION.

AN agent has, broadly, three rights against a principal. First, his right to remuneration; next, a right to an indemnity or to be reimbursed for any advances or expenses; and, thirdly, a lien on his principal's goods and papers in respect of the first two.

Agent three
rights against
principal.

Whether a sub-agent has any rights against the principal depends on there being privity of contract between himself and the principal. Where the agent has no authority to appoint a sub-agent, the principal will not be liable to him, as there is no privity of contract. It has been held that there is no privity of contract between a solicitor's town agent and his client, and that therefore the town agent cannot maintain an action for his fees against the client, nor can the client sue the town agent for negligence (a).

Rights of
sub-agent
against
principal.

Most agencies are not gratuitous, but for some valuable consideration. Commercial agents are usually paid by a commission on the goods sold or the value of the work done, as the method of payment gives them a direct interest in the pushing their employer's business. An agent may leave the remuneration to be whatever his principal may think right, but this may mean he is to be paid nothing (b); or else he may arrange that it shall be a reasonable remuneration, without fixing any rate of payment. The

(a) *Cobb v. Becke* (1845), 6 Q. B. 930.

(b) *Taylor v. Brewer* (1813), 1 M. & Sel. 290. But see *Bryant v. Flight* (1839), 5 M. & W. 114.

amount is usually fixed by the custom of the place or trade (*e*). And if an agent is paid for doing work in one capacity, he cannot claim remuneration besides for the work done as an agent; thus, if an agent is paid for doing work as a managing owner, he cannot also claim commissions for doing the work—which is part of a managing owner's duty—of procuring charter-parties (*d*).

Del credere
commission.

If there is a special arrangement that the agent is to guarantee the solvency or punctuality of the firms with whom business is done, he is paid a higher commission, which is called a *del credere* commission, and he is called a *del credere* agent.

Remunera-
tion not due
until work
done.

Before the agent can sue for his remuneration he must have done the work he undertook to do. He is not entitled to commission unless he has done what the principal required him to do; as, for instance, if he is employed to get money on certain terms, it will not do to get it on other terms (*e*); or if he is to procure a house, the title to which is to be approved of by his principal's solicitor, he has not earned the commission unless he shows that it has been so approved (*f*); or to procure a partner, until deeds of partnership have been exchanged (*g*).

Work must
be done in
reasonable
time;

If the contract of employment between the principal and agent fixes no time within which the work shall be done, it must be done within a reasonable time. It was therefore held that where, in the month of February, 1883, the owner of a public-house had agreed to pay the plaintiff a commission on the valuation of his stock-in-trade upon his sub-letting it "at any future date," the plaintiff was not entitled to his commission when the house was sold in November, 1884, and not through his intervention (*h*).

(*e*) *Cohen v. Paget* (1814), 4 Camp. 96.

(*d*) *Williamson v. Hinc*, (1891) 1 Ch. 390.

(*e*) *Mason v. Clifton* (1863), 3 F. & F. 899.

(*f*) *Clark v. Wood* (1882), 9 Q. B. D. 276.

(*g*) *Martin v. Tucker* (1884), 1 Times, 655.

(*h*) *Houghton v. Orgar* (1884), 1 Times, 653.

The principle as to remuneration is, that there is nothing due to the agent until he has done his work ; but if the contract is not fulfilled because of the default of the principal, then the claim against him for work or commission is a good one (*i*) ; for the principal is equally bound, whether the contract is unfulfilled through his refusing to go on with it or through his letting the third party off (*k*).

unless it being left undone is principal's fault.

The agent must either prove that the (1) business was done, or (2) that there was a binding contract to do it, or (3) that it was prevented from being a binding contract only by reason of the default of the principal in refusing to make the agreement valid and binding (*l*).

What agent must prove to show right to commission.

An architect is not entitled to charge commission on the estimated cost of a building never erected ; such a charge being both improper and unfair, since he has not had the superintending of it to do. In such a case he is only entitled to fair charges for work done, such as plans, drawings, and specifications (*m*).

Architect's charges.

The agent must have done the work as work. For instance, if an agent who has been employed either to sell a ship or let a house, introduces his principal, not in the way of business, but over a dinner-table, or for some other purpose outside the agency, to someone who eventually comes to terms with the principal, no commission will be due. In one case where the agent having failed to get anyone to do what the principal required, introduced the principal to another agent on the chance that the second agent might be more successful ; the second agent purchased himself, and the Court held that under such circumstances the principal was not liable to pay commission (*n*).

Work must have been done as work in the agency.

(*i*) See *L. J. Bramwell in Fisher v. Drewitt* (1878), 39 L. T. 253 ; also *Inchball v. Western Neilgherry Rail. Co.* (1865), 17 C. B. N. S. 733.

(*k*) *Horford v. Wilson* (1807), 1 Taunt. 12.

(*l*) *Grogan v. Smith* (1890), 7

Times, 132 ; and see *Re Sovereign Life Insurance Co.* (1890), 7 Times, 602.

(*m*) *Burr v. Rideout*, Times, 22 Feb. 1893 ; *Farthing v. Tomkins*, Times, 5 July, 1893.

(*n*) *Barnett v. Isaacson* (1887), 4 Times, 645.

Agent must show the contract between principal and third party brought about by him.

It is not sufficient for the agent to show that he introduced the principal to the person who eventually became buyer, in order to entitle him to commission, he must prove that he brought about the relation of buyer, hirer, lender, &c., which the principal instructed him to bring about (o).

Contract between principal and third party must be direct, not remote, result of agent's efforts.

He must show that the contract which has been entered into by his principal and the third party was brought about by his exertions directly. It is not sufficient if in some remote degree he had contributed to bring it about. For the question whether he is entitled to his commission turns on the question whether the business was the result of the agent's negotiations. If an agent employed to get a loan introduces the matter to a person who refuses to entertain the idea himself, but nevertheless mentions it to another, and that other person advances the money, and negotiates direct with the principal, the agent is not entitled to commission; for, as Lord Chief Justice Cockburn pointed out (p), that "commission was not due merely because in some way or other the loan followed casually, indirectly, and as a remote consequence. It must appear that the advance was by or through their agency" (q). So it is not enough for a house agent to prove that he gave a card to view the house; he must show that he has done something which materially brought about the contract between the third party and the principal (r). If the person when introduced as a purchaser refuses to come to terms, but afterwards buys at a public auction, the agent is not entitled to commission (s). It does not matter through how many sub-agents the matter went, if these persons were in fact acting as sub-agents

(o) *White v. Walker* (1884), 1 Times, 603; *Jeffrey v. Crawford* (1890), 7 Times, 618.

(p) *Wilkinson v. Martin* (1837), 8 C. & P. 1.

(q) *Antrobus v. Wickens* (1865),

4 F. & F. 291; *Gibson v. Crick* (1862), 31 L. J. Ex. 304.

(r) *Lofts v. Bourke* (1884), 1 Times, 58.

(s) *Taplin v. Barrett* (1889), 6 Times, 30.

for the agent, and were buying to enable him to earn his commission (*t*); but though an agent may be entitled to be paid for work done by another person, it must be clear that person was acting as sub-agent, and the agent must have been the link between the principal and himself, otherwise, as Chief Baron Pollock pointed out, a claim for remuneration was absurd. He says, "If a broker gives to the principal the name of another person, who names another, who alludes to another, and so on, and the principal employs the last named—that the broker should have any claim on the principal in such a case is simply preposterous, even though a custom can be alleged in support of such a claim" (*u*). In that case the principal had a number of ships for which he wished charters, and they had been passed on from one broker to another, and so eventually got chartered. Such a result is too remote.

Agent entitled to remuneration if contract effected by his sub-agent.

Whether the agent is entitled to his commission turns on the question whether the business really was the result of the agent's negotiations. If an agent employed to get a loan introduces the matter to a person who refuses to entertain the loan, but happens to discuss it with another person, and that other person advances the money and negotiates direct with the principal, the agent is not entitled to commission (*x*).

Contract with third party must be direct not remote consequence of agency.

Where several brokers or agents are negotiating, the one who first introduced the party through whom the business is done, is entitled to the commission (*y*). Where there are several agents, and there is a question of fact as to which agent brought about the bargain, the safest course for the principal appears to be to interplead and pay the money into Court (*z*).

Where there are several agents.

(*t*) *Wilkinson v. Alston* (1879), 41 L. T. 394.

(*u*) *Gibson v. Crick* (1864), 31 L. J. Ex. 304.

(*x*) *Wilkinson v. Martin* (1837), 8 C. & P. 1.

(*y*) *Per Erle, C. J., in Cunard v. Van Oppen* (1859), 1 F. & F. 716; see also the Chief Baron in *Trickett v. Badger* (1856), 1 C. B. N. S. 296, at p. 287.

(*z*) *Barnett v. Brown* (1889), 6 Times, 463.

When agent
entitled to
commission
on a renewal
of a lease.

Agents often claim commission when a house for which they have procured a tenant is re-let to the same person. This is generally held to be too remote a result of the agents' exertions to entitle them to remuneration. It has been held, however, that the agent can claim remuneration for the re-letting if it was owing to an express term in the contract, allowing an option to renew, that this happened; for the agent's remuneration depends on his showing that the work has been done in consequence of his services. He is not entitled, as has been already pointed out, to casual results of his labours, which were not foreseen or intended. The agent's claim must be as a commission on rent obtained as a proximate consequence of his action. Whether it was the proximate consequence depended on the agreement entered into between the landlord and tenant at the time of the original letting (*a*).

*Toulmin v.
Millar.*

It has been held that the mere fact that the agent put on the paper he handed to the principal containing his terms of doing business, a note that when a property which was let to a tenant, and was afterwards bought by the tenant, a commission would be charged on the selling, less the amount received for letting, did not bind the principal unless he had it brought to his notice; for in order to found a legal claim to a commission, there must not only be a consent, there must also be a contractual relation between the introduction and the ultimate transaction of sale (*b*). So where the agent had, under the arrangement he made with the principal, procured a loan of 10,000*l.*, and a year and a quarter afterwards the lender became partner in the principal's business, advancing another 4,000*l.*; the Court held that, though in one sense, in consequence of the original introduction, the principal obtained the further sum, the question was whether the subsequent

Not entitled
to commission
on partner-
ship, although
he introduced
originally
new partner
as lender.

(*a*) *Curteis v. Nixon* (1871), 24 L. T. 706.

(*b*) *Per* Lord Watson, *Toulmin v. Millar* (1886), 3 Times, 836.

partnership was the result of the introduction, or of an independent negotiation between the principal and the lender? The question was not what was the *causa proxima*; the agent must show that some act of his was the *causa causans*; and it being admitted that the subsequent advance was not contemplated at the time of the original advance, the agent failed to establish his right to commission on it (*e*). In *White v. Barter* (*d*), the question left by Mr. Justice Williams to the jury under similar circumstances was also whether the business was contemplated at the time of the introduction. Even if the business has been contemplated at the time, if the person who subsequently purchases, and who has been introduced by the agent, does not purchase for a long time afterwards, it is a question whether, in doing so, this was the result of the original introduction (*e*), and if they decide it is not, the principal is not liable for commission. If a commission agent stipulates that he is to have a commission on all future orders from any person he introduces, he is entitled to such commission, though he may have left the principal's service, unless it appears that the future orders were not traceable to his efforts (*f*).

The work for which the agent claims remuneration must have been within the scope of his employment or authority to render the principal liable; in other words, it must have been authorized. It is not enough for the agent to prove that the principal has gained some advantage by his services, if those services were not within the scope of the agency. For instance, if an agent is employed to let, and the premises instead of being let are sold, he is entitled to

Work done
must be done
within scope
of agency.

(*e*) *Tribe v. Taylor* (1876), 1 C. P. D. 505.

W. R. 716.

(*d*) (1883), 1 Cab. & Ellis, 199.

(*f*) *Bilbee v. Hesse & Co.* (1888), 5 Times, 677; *Boyd v. Tobit Paper Co.* (1887), 4 Times, 332.

(*e*) *Lumley v. Nicholson* (1886), 34

nothing (*g*). In many cases, it is a question what the real authority was, whether it was a particular authority to do a particular thing, as to get a tenant; or a general authority to do whatever was practicable, as to sell or let, whichever might turn out possible or most advantageous.

Principal cannot slightly alter the contract between himself and third party to make it outside agency.

The principal will not be allowed to cheat the agent by slightly altering the nature of the business so as to make it outside the agent's authority. If the business done is substantially that which the agent was authorized to get done, he will be entitled to his commission (*h*); thus, where the agency was to sell land, the principal cannot, by contracting to give a long lease for 999 years to the third party, avoid paying the commission.

Work must be properly done to earn commission.

The work must be properly done. If a broker negotiates a charter-party he must make it in intelligible terms, for if the terms are not clear his charge is made practically for introducing confusion, and leading the parties into law suits, the question for the Court in such cases is whether the principal has derived advantage from the acts of the agent (*i*), or whether the work, through the careless or negligent way it has been done, is useless.

Mere taking trouble does not entitle agent to remuneration.

The mere fact of incurring trouble, while the work has been useless to the principal, does not make it a subject-matter for remuneration, which word implies that it is a reward for useful labour. If there is any doubt as to its usefulness, or that it was necessary for accomplishing the principal's object, that is a question for the jury (*k*).

What agent's work may be completed by introduction only.

Sometimes the only duty of the agent is to introduce the parties, and when that has been done he has completed his part of the transaction, and if business ensues, *i.e.*, the

(*g*) *Toulmin v. Millar* (1886), 58 L. T. 96; 12 App. Cas. 746.

(*h*) *Simpson v. Lamb* (1856), 17 C. B. 603; *Griffin v. Cheeswright* (1885), 2 Times, 99.

(*i*) *Diamond v. Holiday* (1824), 1

Car. & Pay. 384; as to auctioneer doing work badly, see *Peiree v. Corf* (1879), L. R. 9 Q. B. 210.

(*k*) *Hill v. Fetherstonhaugh* (1831), 7 Bing. 569; *Shaw v. Arden* (1832), 9 Bing. 287.

contract is completed, he is entitled to his commission (*l*); and it is not necessary that the actual sale should have been negotiated by him if the relation of buyer and seller was the result of his introduction (*m*).

In *Beable v. Dickerson* (*n*) the principal instructed the agent to sell for him certain bank shares, by auction or otherwise; the agent advertised the shares, and the bank, not liking to see their shares hawked about, wrote to the agent offering to procure a purchaser; the agent accepted the offer and the shares were sold by the bank. The agent claimed a commission on the sale; but it was held that he was not entitled to any, as he had voluntarily chosen to divest himself of his authority by handing over the sale to the bank, who had no interest in getting the best possible price for them.

Agent must have *bonâ fide* executed his authority to earn commission.

If the principal makes a representation on which basis the agent proceeds to do the business, and succeeds in getting the work done, but afterwards, owing to the representation being untrue, the whole business falls through, he will still be entitled to his commission (*o*).

If through principal's fault contract goes off, agent entitled to commission.

As regards the class of cases where the business goes off where there is no default in the principal, the cases are very conflicting. They are decided mostly on the wording of the particular contract. In *Peacock v. Freeman* (*p*), Lord Justice Lindley said, "A principal does not warrant to the auctioneer that he has a title to sell which could be forced on a purchaser"; but that case was decided on the ground that the particular contract there was construed to make commission only payable on a completed sale. In another case (*q*), the third party refused to com-

Where no default and contract goes off.

Unknown flaw in title

(*l*) *Walker v. Walker, Donald & Co.* (1884), 1 Times, 603; and see *Re Beale, Ex parte Durrant* (1888), 5 Mor. Bank. 37.

(*m*) *Green v. Bartlett* (1863), 14 C. B. N. S. 681.

(*n*) (1884), 1 Times, 654.

(*o*) *Green v. Lucas* (1875), 31 L. T. N. S. 731; (1876), 33 L. T. 584.

(*p*) (1888), 4 Times, 541.

(*q*) *Green v. Lucas* (1876), 53 L. T. 584; see also *Lockwood v. Levick* (1860), 8 C. B. N. S. 603.

causing
failure to
complete.

plete because of a defect in title, which neither party knew of at the time the contract was made by the principal with the agent. In that case Lord Cairns said, "It appears to me that the plaintiffs (the agents) had done everything which agents in this kind of work are bound to do, and it would be forcing their liability if they were held answerable for what happened after. If the contract afterwards were to go off from the caprice of the lender, or from the infirmity in the title, it would be immaterial to the plaintiffs (the agents)"; and later in his judgment he puts the following dilemma: "Either it (the flaw in title) was a sufficient reason in refusing to go on with the loan or it was not. If they (the third parties) were not justified, the defendant (the principal) ought to have proceeded against them, and if they were justified then the failure of the loan was owing to the defendant's own default or the failure of the security he had proposed." Lord Justice Bramwell (^r) said: "Now the current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced. Why should the right to be paid for work depend on what takes place between other parties outside the contract?" and he treats the bargain going off through some default in title or failure to comply with a reasonable requisition, as if it were the principal's default.

Principal not
bound to
accept dis-
advantageous
terms.

The principal is not liable to pay commission if he has refused a charter because its terms were unfair (^s). Chief Justice Tindal in that case said: "If the defendant was right in rescinding the contract, that will be an answer also to the claim for expenses. The question, therefore, will be whether, when the charter-party was

(^r) *Fisher v. Drewett* (1878), 39 L. T. 253, and 48 L. J. 33.

(^s) *Dalton v. Irwin* (1830), 4 C. & P. 289.

presented to him for signature, he had a justifiable cause for refusing to sign it, saying, 'this is not the contract I was entitled to expect,' for if he had then the plaintiff cannot recover, even for the expenses" (*t*). Shipbrokers are by custom not entitled to recover anything, even for expenses, if their labours have resulted in nothing (*u*).

If the agent acts rather in the interest of a third party than in that of his principal, he cannot recover for his services (*x*); and if he earns money for a third party when his whole services (as in the case of a master of a ship) belong to his principal, he cannot recover it (*y*), but on the contrary, can be restrained by the principal from receiving anything he may have earned while in his service, as, for example, the profits of private trading (*z*). But if a principal employs an agent and does not state what his remuneration is to be, and the agent goes and transacts business on that footing, the principal, knowing that the agent is to receive his remuneration from the other persons with whom he deals, and not choosing to ask what the amount is, is bound by the custom and cannot recover it (*a*).

Agent not doing best for principal cannot recover.

If the agent's interests in the contract are on the side of the third party, as he cannot properly be an agent at all (see chapter II., "Who may be Principal and who Agent," p. 9), so he is not entitled to commission; as where a person acts as agent for a vendor and sells the property to a company in which he has shares. Chief Baron Pollock, in such a case (*b*), said: "No authority has been adduced for a departure from the general principles governing such a case, and the argument has

Agent interested for third party not entitled to commission.

(*t*) See also *Read v. Rann* (1830), 10 B. & C. 438.

(*u*) *Dalton v. Irwin*, *ubi supra*; *Broad v. Thomas* (1830), 7 Bing. 99; *Read v. Rann* (1830), 10 B. & C. 438.

(*x*) *Hurst v. Holding* (1810), 3 Taunt. 31.

(*y*) *Thompson v. Havelock* (1808), 1 Camp. 527.

(*z*) *Gardner v. M'Cutecheon* (1842), 4 Beav. 534.

(*a*) *Great Western Insurance Co. v. Cunliffe* (1874), 9 Ch. 525.

(*b*) *Salomons v. Pender* (1865), 3 H. & C. 639.

failed to convince me that a person can in the same transaction buy in the character of principal and at the same time charge the seller as his agent. I cannot agree that because a seller has chosen to abide by the sale he is therefore to be held to have acknowledged the claims of the plaintiff both as agent and purchaser."

No commis-
sion on illegal
contract ;

If the contract is illegal the agent will not be entitled to commission (*c*) or to be paid, as he will also not be able to sue for an indemnity (see *post*). But if the principal sets up such a defence he will have to make out that the contract was necessarily illegal, and it will not do to prove that if carried out in a certain way it was illegal (*d*). If the contract relates to betting or gaming, although not illegal, but only void, he will not be able to recover any commission (*e*).

Nor on void
contracts.

Insanity of
third party.

If the agent makes a contract with a person who though sane afterwards becomes insane, as the contract is enforceable against his representatives, he is entitled to his commission, unless it is a contract which, owing to the insanity, could not be carried out. Thus it is no defence to a claim for commission on the sale of a yacht that the purchaser has become insane (*f*).

Stockbroker
contracting
without send-
ing contract-
note.

Stockbrokers are by sect. 17 of the Inland Revenue Act, 1888, directed to make and execute a contract-note of the transaction—*i. e.*, a bought or sold note, as the case may be. It is, however, no defence to an action for commission that no such note has been sent (*g*).

When agent
can recover on
quantum
meruit.

Unless the contract is so worded that the agent is entitled to nothing unless he succeeds, he may sue on a *quantum meruit*, and recover remuneration in proportion to the work he has done (*h*). But where there is an express

(*c*) *Josephs v. Febrer* (1825), 3 B. & C. 639; *Bensley v. Bignold* (1822), 5 B. & Ald. 335.

(*d*) *Huines v. Busk* (1814), 5 Taunt. 521; *Lercy v. Yates* (1838), 8 Adol. & Ell. 129.

(*e*) 55 Vict. c. 9, s. 2.

(*f*) *Platt v. Depree*, (1893) 9 Times, 194.

(*g*) *Learoyd v. Bracken*, (1893) 10 Times, 61; (1894) 1 Q. B. 114.

(*h*) Story on Agency, § 329.

contract there can be no implied contract, and therefore the agent cannot, where the contract is express, and says nothing about a *quantum meruit*, sue on an implied contract to pay a *quantum meruit* for his services (*i*). Lord Esher, in *Barnett v. Isaacson* (*k*), said, to “entitle a person to sue on a *quantum meruit* the rule was, that if the plaintiff relied on the acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if the defendant accepted what had been done it was on the terms that he should pay for it.” If the principal and agent chose to make a bargain by which the right to commission was to be dependent upon a condition, such as the introduction on the one side and the acceptance by the other of a partner who would bring money into the principal’s business, the agent cannot claim on a *quantum meruit*, because they had chosen to tie themselves down by the express terms of an agreement (*l*).

If the principal does the work himself or revokes the authority the agent is not entitled to commission, but the principal will have to pay for the labour and trouble incurred by the agent up to the time of revocation (*m*).

Principal may do work himself.

If the work has been done already the principal cannot escape paying the remuneration by saying he has revoked his authority (*n*). (As to when the authority can be revoked, see Chapter on “Termination of the Agency.”) In some cases the principal is not entitled to do the work himself, as where he has appointed him a sole agent to sell in a certain district, giving him a commission on all goods sold in such district, for doing so would be revoking *pro tanto* his authority (*o*).

Principal cannot escape paying commission if work done.

When principal cannot do work himself.

(*i*) *Lott v. Outhwaite*, (1893) 10 Times, 76.

(*k*) (1887), 4 Times, 645.

(*l*) *Martin v. Tucker* (1884), 1 Times, 655.

(*m*) *Simpson v. Lamb* (1856), 17 C. B. N. S. 603.

(*n*) *Wilkinson v. Alston* (1879), 41 L. T. 394.

(*o*) *Snelgrove v. Eltringham* (1881), 45 J. P. 408.

When remuneration payable.

A question sometimes arises as to the time when the remuneration is payable, whether when the work is done or when the principal reaps the result. This is to a great extent decided by custom. House agents, where the rent is paid through them, usually deduct the commission before paying the rent over, and if the rent is payable in two instalments, as in the case of a furnished house, deduct half in the first instalment and half in the second. If the commission is payable on the sale of the property, it is not due until the conveyance is completed (*p*).

Building land.

In the case of land let as building property, the agent's commission does not accrue until the ground rents begin to come in, that is usually after the houses have been built (*q*). Mr. Justice Byles, in *Lara v. Hill* (*r*), said: "There are four epochs at which commission may be payable. First, at the time of the adjustment of the terms of the sale; or, secondly, at the time stipulated in the contract; or, thirdly, at the time stipulated for the completion of the purchase; or, fourthly, at the time of the actual payment of the purchase-money."

Agent can sue for commission in principal's bankruptcy.

When the agent has done his work, he is entitled to his commission, although no benefit may have resulted to the principal or his estate from his labours owing to the principal's bankruptcy, and he has a right to prove for the amount against his estate (*s*).

(*p*) *Peacock v. Freeman* (1888), 4 Times, 511.

(*q*) *Kirk v. Evans* (1889), 6 Times, 9.

(*r*) (1863), 15 C. B. N. S. 45.

(*s*) *Re Beale, Ex parte Durrant* (1888), 5 Mor. Bank. Cas. 37.

CHAPTER XI.

INDEMNITY.

THE next right of the agent against the principal is to be indemnified against any loss or injury in carrying out the agency. The rule is thus laid down: Where an act has been done by the plaintiff, under the express directions of the defendant, which occasions an injury to the right of third persons; yet, if such an act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.

In *Adamson v. Jarvis* (a), which was an action by an auctioneer against a person who had induced him to sell certain things under the representation that he was the owner, and so made him liable to an action for conversion by the true owner, Chief Justice Best, in answer to an argument that there was no contribution between joint tort feasers, said: "It was certainly decided in *Merryweather v. Nixon* that one wrongdoer could not sue another for contribution. Lord Kenyon, however, said that the decision would not affect cases of indemnity, where one has employed another to do acts not unlawful in themselves for the purpose of asserting a right." This principle seems to have been laid down so early as James I.'s reign, in *Fletcher v. Harcot* (b), and was approved of in *Dugdale v. Lovering* (c). In *Fletcher v. Harcot* an innkeeper brought an action against a certain Harcot, who had told him

(a) (1827), 4 Bing. 72.

(b) (1623), Hutton, 55.

(c) (1675), L. R. 10 C. P. 196,
by Brett and Grove, JJ.

he had lawfully arrested one Battersley, and asked him to be kept safely in the inn for a night. In consequence of doing so the innkeeper had an action for false imprisonment brought against him, and had to pay 10*l*. Harcot's counsel argued in his defence that it did not appear that Harcot had properly arrested Battersley, and that the plaintiff could not recover for the results of an illegal act. But Lord Hobart distinguished the case where a man gave an indemnity for doing an action which was clearly unlawful from the case before him, where the action appeared to be lawful, and gave judgment for the plaintiff, the innkeeper. The rule that wrongdoers cannot have redress or contribution against each other is therefore confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act (*c*).

Right to indemnity where act apparently lawful.

Agent's right to be reimbursed expenses.

An agent is entitled to be reimbursed all expenses he is put to in carrying out his principal's instructions, and he is entitled to be indemnified against any loss or damage which may accrue to him in carrying out the lawful instructions of his principal, and in protecting his principal's interests (*d*). The right to indemnity arises out of the original contract of employment. Every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful, if the employer had the authority he pretends to have. Therefore, if the agent is made liable to an action, or defends an action for his principal, he has a right to be indemnified against the costs incurred therein. If, however, he defends an action of his own wrong, and without authority, he is not entitled to call upon his principal to pay the costs, as they were incurred without his consent (*e*).

Right arises out of contract of employment.

Costs of action.

(*c*) See *Betts v. Gibbins* (1834), 2 A. & E. 57; and *Adamson v. Jarvis* (1827), 4 Bing. 66.

(*d*) *Curtis v. Barclay* (1826), 5 B. & C. 141.

(*e*) *Per* Lord Ellenborough, *Spurrier v. Elderton* (1803), 5 Esp. 1.

If the agent pays money on behalf of his principal, which the principal was not liable to pay, and which the agent, therefore, ought not to have paid, he cannot recover it back from the principal, or retain an amount against him for such purpose (*f*).

Agent cannot recover improper payments.

If an action is brought by an agent against his principal to recover the amount of damages sustained by him in a suit which he defended on behalf of the principal, he must show, in order to entitle him to recover: first, that the loss arose from the fact of the agency; secondly, that he was acting within the scope of his authority; and thirdly, that the fault was not attributable to any laches on his part (*g*).

If damages given against agent, what must be proved to recover from principal.

If the loss happens through the agent's own default, as, for instance, where stockbrokers, owing to their bankruptcy, had to close shares and sell them at a loss, the principal is not liable to indemnify him for such a loss (*h*). Mr. Justice Blackburn, in giving judgment, said: "It must be admitted that for any loss incurred by an agent by reason of his having entered into such contracts according to such rules (the Stock Exchange Rules), unless they are wholly unreasonable, and where the default is without any personal default of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect (*i*). But it is argued that where the agent, as in this case, is subjected to loss not by reason of his having entered into the contracts he was authorized to enter into by his principal, but by reason of a default of his own, that is to say, as in this case, by reason of his insolvency brought on by want of means to meet his other primary obligations, it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and, consequently, there is no promise

Principal not bound to indemnify agent against results of his own default, *e. g.*, his negligence or bankruptcy.

(*f*) *Howard v. Tucker* (1831), 1 B. & Adol. 712.

(*g*) *Frixione v. Tagliaferro* (1856), 10 Moore, P. C. 175.

(*h*) *Duncan v. Hill* (1873), L. R. 8 Exch. 242.

(*i*) *Harker v. Edwards* (1887), 57 L. J. Q. B. 147.

which can be implied on the part of his principal to indemnify him; and, in the present case, there is certainly no express promise to that effect. These allegations both as to fact and law seem to me correct. . . . The plaintiffs' insolvency was, as regards the defendants, entirely the result of their own default. We think there is no implication of law to force upon the defendants an obligation to indemnify the plaintiffs in such a case."

If bankrupt stockbroker gives client option of carrying out contract with jobber, client still liable to indemnify for loss.

If, however, the agent gives the principal the choice of having his original contract carried out, and deal himself with the jobbers, or elect to ratify what was done, and have it closed at the official prices, and the principal elects the latter, he will have to indemnify the agent (*j*), for the loss is then not occasioned by the bankruptcy, but is the result of the principal's own act. Therefore, to establish an obligation to indemnify, the agency must be the cause, and not merely the occasion, of the loss (*k*).

In *Campbell v. Larkworthy* (*l*) an agent undertook when going to Australia to deliver an ice machine to persons to whom the principal had agreed to sell it for shares in a company; the arrangement being that the agent should receive a certificate of the shares in his own name and so become a shareholder, and to keep the certificate to hand over to the principal. The agent did so. Subsequently, a call was made on the shares, and the agent being the registered holder was obliged to pay it. Under these circumstances it was held that he was entitled to an indemnity from his principal.

Principal not bound to indemnify against loss by unreasonable custom.

The agent is bound to do the work he is employed to do in accordance with the custom of his trade or business, and the principal must indemnify him against any loss incurred in carrying out his directions according to such customs. If the loss is incurred owing to an unreasonable custom, as for instance, to hold a contract binding

(*j*) *Hartas v. Ribbons* (1889), 22 Q. B. D. 254.

(*k*) Story, § 341.

(*l*) (1893) 9 Times, 528.

which is not binding in law, the principal is not obliged to indemnify his agent. Thus, it was decided that, as against strangers, the custom of the Stock Exchange to disregard Leman's Act (*n*) (which provides that contracts for shares shall specify their numbers) was an unreasonable custom and not binding, and that therefore a principal, not knowing of it, was not bound to indemnify a broker who made a contract which was good by the custom of the Stock Exchange, but void in law (*n*). Lord Bowen, in his judgment, said: "The question is narrowed to this—Is a man who employs a broker to deal in a particular market bound to know a usage there to make an invalid instead of a valid contract, and a usage according to which, when he has ordered one thing, he is expected to take another thing? It would not be reasonable, I think, to hold that a person is bound by such a usage, unless beforehand he was told or had knowledge of it."

A principal may be bound by an unreasonable custom if he knows of it. Thus, in *Seymour v. Bridge* (*o*) the principal was held bound by the contract, although it did not comply with Leman's Act. It has, however, been held that to bind him it must be proved that he knew of the custom and consented to be bound by it at the time he made the bargain (*p*).

Otherwise if the principal knows.

But a custom to close the account if a balance of differences in the broker's favour has not been paid him by his principal upon the pay day of the current settlement, provided that the broker has given his principal notice of the amount beforehand, has been held good. The agent therefore has a right to close his principal's account with the jobber, and require his principal

Custom to close account if differences not paid, good.

(*n*) 30 & 31 Vict. c. 29, s. 1.

(*n*) *Perry v. Barnett* (1885), 15 Q. B. D. 388.

(*o*) (1885), 14 Q. B. D. 460.

(*p*) *Cooke v. Eshelby* (1887), 12 Ap. Cas. 271; *Blackburn v. Mason*, (1893) 9 Times, 286.

to indemnify him for any differences he has paid for him (*q*). By the custom of the Stock Exchange the stockbroker is responsible for the genuineness of the documents until the shares have been registered by the purchaser, and even after registration if a Court of law decides that the purchaser has no title to be registered is a good custom. Hence, if the stockbroker has in either of these cases got to pay the price of them back, the principal must indemnify him (*r*).

Court will not give indemnity where contract illegal;

It is an established principle that the Court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect anything which is prohibited by law. The question in such a case is, whether the persons who seek to enforce a contract know its object (*s*). So it was held in *Langton v. Hughes* (*t*), that if the agent knew that his principal's intention was to break the law, as, for instance, that he required the goods to convey them in a smuggling transaction he could not sue on the contract. Lord Justice Lindley, in *Thacker v. Hardy* (*u*), which was an action for differences due on gambling transactions on the Stock Exchange, discusses the right of an agent to an indemnity. He first says: "On general principles an agent is entitled to an indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal unless those orders are (1) illegal; or (2) unless the liabilities are incurred in respect of some illegal conduct; or (3) by reason of his default." He then discusses whether gaming and wagering are illegal, and says if they were he would be of opinion that the illegality of the transactions in which the plaintiff and defendant were engaged would have tainted, as between themselves, whatever had been done by the agent in furtherance of such

(*q*) *Davis & Co. v. Howard* (1890), 24 Q. B. D. 691.

(*r*) *Smith v. Reynolds* (1892), 66 L. T. 808; and (1893), 9 Times, 494.

(*s*) *Langton v. Hughes* (1813), 1 M. & Sel. 593.

(*t*) *Ubi supra*.

(*u*) (1879), 4 Q. B. D. 685.

designs, and would preclude him from claiming in any Court of law any indemnity in respect of them.

Then, in answer to the argument that a contract by the agent which was void could not be made the foundation of an implied promise to indemnify, Lord Justice Lindley says: "It appears to me sufficient to say that an obligation to indemnify is created whenever one person employs another to do a lawful act which exposes him to liability," and he held, therefore, that as the contract the agent was employed to carry out was only an unenforceable and not an illegal one, the agent was entitled to be indemnified. In *Read v. Anderson (r)*, the plaintiff, the agent, was under no legal liability to pay, but at the same time he would have been ruined in his business as a bookmaker if he did not pay the debts, and the Court held that the principal must be considered to have impliedly contracted to indemnify him from the consequences which would ensue in the ordinary course of the agent's business of making bets for him; *i.e.*, that the agent would have to pay them or be turned out of Tattersall's. In other words, that the principal was liable to indemnify his agent, not only against the legal liabilities which resulted from that agency, but the unpleasant consequences resulting from the carrying out his instructions, if they were not foreseen when making the contract and provided for in the remuneration. In *Thacker v. Hardy*, as Lord Justice Brett pointed out, the agent was under a legal liability to the third party to pay.

Otherwise if contract merely void.

By the Gaming Act, 1892, which was passed on the 20th May, 1892 (*x*), "*Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the 8 & 9 Victoria, chapter 9, or to pay any sum of money by way of commission, fee, reward, or*

No action for indemnity on gaming contract can be brought.

(*r*) (1884), 13 Q. B. D. 779.

(*x*) 55 Vict. c. 9.

otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." The 8th section of the 8 & 9 Vict. c. 109, enacts that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering shall be null and void. It would therefore seem that though the principles laid down in *Thacker v. Hardy* and *Read v. Anderson* are not impugned, yet so far as they apply to gaming or wagering, whether on the Stock Exchange or on horse racing, they are no longer law.

No indemnity where payment in respect of gaming.

In *Tatam v. Reeve* (y), which was decided since the Act, the principal wrote to his agent the following letter:—"Dear Mr. Tatam,—Kindly settle the enclosed account for me as I don't know where to catch all the men, and I have to catch an early train to Henley. Yours truly, H. Reeve." The account inclosed purported to show that Mr. Reeve was indebted to four people to the amount of 148*l.*, but not how the debts arose. The agent said that he paid them simply on the principal's request contained in the letter, and that they were not in respect of bets made by him on behalf of his principal. On these facts a Divisional Court, composed of Lord Coleridge and Mr. Justice Wills, held that the agent was not entitled to an indemnity. Lord Coleridge, in giving judgment, said: "All the sums of money were, as a matter of fact, due for bets which the defendant had made and lost. It was argued that they were not paid in respect of bets within the meaning of the Act of Parliament. I cannot feel any doubt or hesitation in coming to the conclusion that they were paid 'in respect of a contract made null and void by 8 & 9 Vict. c. 109,' and I agree that they were not paid 'under' such a contract or agreement because there was

no contract of betting or gaming between the plaintiff and the defendant, but the money was paid in respect of gaming debts which the defendant owed to the persons to whom the plaintiff paid it, and it was paid in order to discharge those debts. Except that the defendant owed the money to those persons he would not have given the plaintiff the order to pay it; how can it be said it was not paid in respect of those debts? I decide this case with less hesitation than I think the plaintiff was not an ignorant person in the transaction." Mr. Justice Wills, in giving judgment, said: "The Act was passed with the express purpose of getting rid of the decision in *Read v. Anderson*" (z). The Act, however, has been held not to be retrospective (a).

Where the betting agent has received money for the principal in respect of a bet, he must account for it to him, and the Gaming Act is no defence (b).

(z) *Ubi supra*.

(a) *Knight v. Lee*, (1893) 1 Q.B. 41.

(b) *De Mattos v. Benjamin* (1894),

10 Times, 221.

CHAPTER XII.

LIEN AND STOPPAGE IN TRANSITU.

THE third right which the agent has against his principal is the right to a lien. A lien is the right in one man to retain that which is in his possession, belonging to another, till certain demands of his, the person in possession, are satisfied (*a*). In the present chapter the cases are discussed in which this right of retainer arises. There are two kinds of liens: a general lien and a particular lien. A particular lien is a right to retainer of a thing for some charge or claim growing out of, or connected with, that identical thing. The claim may arise for labour expended, or by express contract, on an advance on a particular account.

Particular
lien.

General lien.

A general lien gives a right to retain a thing, not only for such charges and claims, but also for a general balance of accounts between the parties in respect to other dealings of a like nature. A general lien arises either by express contract or by custom of trade.

Factors (*b*), bankers (*c*), insurance brokers (*d*), stock-brokers (*e*), packers (*f*), and wharfingers (*g*) have a general lien on their principal's property; a broker has only a special or particular lien (*h*).

(*a*) *Hammond v. Bavelay* (1802), 2 East, 226.

(*b*) *Walker v. Birch* (1795), 6 T. R. 258.

(*c*) *Brandao v. Barnett* (1846), 3 C. B. 531.

(*d*) *Westwood v. Bell* (1815), 4 Camp. 348.

(*e*) *Jones v. Peppercorn* (1859), 28 L. J. Ch. 158.

(*f*) *Re Witt, Ex parte Shubbrook* (1876), 2 Ch. Div. 489.

(*g*) *Naylor v. Mangles* (1794), 1 Esp. 109.

(*h*) *Thompson v. Beatson* (1823), 1 Bing. 145.

To acquire a lien there must be a sum due on a general balance of account, or else money advanced on the particular thing detained. The lien may also be in respect of bills to fall due (*i*), and may include interest (*k*).

How lien acquired.

An agent can only claim a lien (whether it is a banker's, factor's or other lien) if the goods came into his possession in that capacity. Chief Justice Jervis said (*l*): "A man is not entitled to a lien because he happens to fill a character which gives him such a right, unless he has received the goods or done the act in the particular character to which the right attaches." The agent must have obtained possession *as agent* to claim a lien, so that if he has obtained possession tortiously he cannot claim a lien (*m*).

Lien only arises where goods received as agent.

The lien only attaches in the property of the person for whom the work or advance is made, and property cannot be held for a debt due to another person (*n*). An insurance broker may, however, hold the proceeds of an insurance for the cost of his general lien against the person for whom he effected the insurance, if he thought that he was making the insurance on his behalf at the time; because it is such an agent's practice to make advances on the credit of the policies (*o*). After the insurance broker has notice that some other person is interested in the policy, what remains over after satisfying the lien belongs to the person on whose behalf the policy was really effected. Liens on negotiable instruments are another apparent exception to this rule, and that is only because the person in possession is the owner, since the property passes by delivery (*p*).

Only attaches to principal's property. When otherwise.

As an agent's lien is a possessory lien, he cannot have a lien except when he is in possession actually or construc-

Lien depends on possession.

(*i*) *Montague on Liens*, 19; *Hammond v. Barelay* (1802), 2 East, 226.

(*k*) *Exp. Kensington* (1835), 1 Deac. 58.

(*l*) *Dixon v. Stanfield* (1850), 10 C. B. 398.

(*m*) *Bruee v. Wait* (1837), 3 M. &

W. 15.

(*n*) *Turner v. Deane* (1849), 3 Ex. p. 838.

(*o*) *Mann v. Forrester* (1814), 4 Camp. 60.

(*p*) *Brandao v. Barnett* (1846), 3 C. B. 519.

tively (*q*). It has been held, in *Bryant v. Nix*, that where a person advances money on particular goods, and those goods have been appropriated to him, the property in them has passed to him, and he can maintain an action for trover (*r*). This case is referred to in text-books as showing that under certain circumstances possession is not necessary to have a lien; but it appears that the transaction was rather in the nature of a purchase or pledge than a lien.

If agent agrees to apply proceeds in particular way, he cannot set up lien.

If the agent, however, accepts possession with express directions to apply the property in a particular way he cannot set up a lien in opposition to those directions, only what remains after answering the particular directions can become subject to the lien (*s*). A lien is good although the claim for which it is held is barred by the Statute of Limitations (*t*).

Lien cannot be claimed where goods entrusted for custody *only*.

If a document has been left merely for a particular purpose for safe custody and not as security in the hands of an agent, he cannot claim a lien on it for advances (*u*), nor if he has obtained possession for a particular purpose (*x*).

When lien can be realized.

When the goods are deposited as a *pledge* to secure an advance, the factor or other agent seems to have a right to realize if the debt is not paid (*y*); with this exception, the only way the lien can be enforced is to retain possession; for, although advances made by a factor confer a lien on the goods in his favour, they do not create a pledge (*z*). If a factor sells, as he can under the powers in the Factors Act, to a person who does not know that he has no authority to sell, he confers a good title, but he is liable to an

(*q*) *Hutton v. Bragg* (1816), 7 Taunt. 15.

(*r*) *Bryans v. Nix* (1839), 4 M. & W. 775. See, also, *Evans v. Nichols* (1841), 4 Scott, N. R. 43.

(*s*) *Frith v. Forbes* (1862), 32 L. J. Ch. 10.

(*t*) *Mudden v. Kempster* (1807), 1 Camp. 12; *Spears v. Hartley* (1800), 3 Esp. 81.

(*u*) *Muir v. Fleming* (1822), D. & R. N. P. C. 29.

(*x*) *Burn v. Bone* (1817), 2 Stark. 272.

(*y*) *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Halliday v. Holgate* (1868), L. R. 3 Ex. 299, at p. 302.

(*z*) See Smith's *Mercantile Law*, 10th ed. p. 126.

action for breach of his authority (*a*). It has been held that a factor, although his principal is indebted to him and has made default in repaying those advances, has no right to sell, though he does so in the exercise of a sound discretion (*a*). Mr. Russell (*b*) points out that though a factor who is agent for sale may sell and thus realize his lien, as he has a lien on the proceeds, a factor who is agent to purchase cannot do so unless there were some special custom allowing him, such as was proved in one case where the factor proved a custom that, if the principal became bankrupt before the time for taking delivery came, the agent was entitled to sell (*c*). When factor can sell.

As the lien depends on possession, if the agent gives up possession either to the principal personally or to his agent (*d*), it is lost. If he pledges the goods tortiously, the owner's right to possession revives, and he may maintain an action of trover for them (*e*). If the principal, however, gets the goods back by fraud, the lien is not lost (*f*). Lien lost with possession.
Exception.

As has been pointed out, a lien is destroyed if the person entitled to it gives up his right to the possession of goods, and this is so even if the only way he has given up possession is by having them taken in execution at his own suit and sold to him. Chief Justice Best said: "If another person had sued out execution, the lien might have been insisted upon, but when the person claiming the lien himself calls upon the sheriff to sell, he sets up no title to the lien, for, in order to sell, the sheriff must have had possession (*g*), but after he had possession from Messer (the agent), and with his assent, Messer's subsequent

(*a*) *Smart v. Sandars* (1848), 5 C. B. 895.

(*b*) Russell on Mercantile Agency, 172.

(*c*) *Lienard v. Dressler* (1864), 3 F. & F. 212.

(*d*) *Sweet v. Pym* (1800), 1 East, 4.

(*e*) *Scott v. Newington* (1833), 1 M. & Rob. 252.

(*f*) *Wallace v. Woodgate* (1824), 1 C. & P. 575.

(*g*) *Per C. J. Best*, in *Jacobs v. Latour* (1828), 5 Bing. 130.

possession must have been acquired under the sale and not by virtue of his lien."

Lien lost by agent setting up inconsistent claim.

A lien will be lost if the person having a right to it sets up a claim totally inconsistent with it, such as denying the plaintiff's title to the goods at all (*h*); but if a lien is claimed on two grounds, only one of which is tenable, the untenable claim does not make it unnecessary to tender the amount due on the good claim (*i*). If a lien is lost by losing possession, if re-possession is given, it will revive (*j*). When security is taken for the amount of the lien, the lien is gone (*k*); but if possession is kept and the security turns out to be bad, the lien revives (*l*).

Lien revived by re-possession.

Lost by taking security.

Auctioneers' lien.

Auctioneers have much larger rights than ordinary agents. The actual delivery of goods is intrusted to them, and they have a lien on goods for the charges, and their possession of goods is complete till delivery (*m*). Where the goods are paid for by the buyer, the lien is transferred from the goods on to the purchase money, for he has a lien as well on the proceeds of the sale as the thing sold (*n*). An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction room, for on the premises of the owner an actual possession is given to auctioneer and his servants by the owner, not a mere authority to sell. An auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay (*o*).

(*h*) *Jirks v. Richards* (1842), 5 Scott, N. R. 534.

(*i*) *Scarfe v. Morgan* (1838), 4 M. & W. 270.

(*j*) *Lery v. Barnard* (1818), 8 Taunt. 149.

(*k*) *Hewison v. Guthrie* (1836), 3 Scott, 298.

(*l*) *Stevenson v. Blakelock* (1813), 1 M. & Sel. 535. See, also, *The Simlah* (1852), 15 Jur. 865.

(*m*) *Woolfe v. Horne* (1877), 2 Q. B. D. 355.

(*n*) *Robinson v. Rutter* (1855), 4 El. & Bl. 954.

(*o*) *Williams v. Millington* (1818), 1 H. Bl. 81.

Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer unless there be an express contract or circumstances that show an implied contract inconsistent with lien (*p*), such as treating particular securities as only deposited to secure certain overdrafts and accounts (*q*), or taking a memorandum from a customer expressly pledging the title deeds of only one of two properties, the title deeds to both of which were deposited simultaneously. But between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer in the absence of a special contract to say that securities which he deposits are only applicable to one account. It lies on him to make out that there has been either one course of dealing or one special agreement to exclude the general rule that a banker has a general lien (*r*). Bankers have, however, no lien on plate, boxes, &c., committed to their charge for safe custody (*s*).

Bankers' lien is a general lien.

Bankers have also no lien if the property is trust property, and deposited in breach of trust to secure a balance, although they have had no notice of the trust; but the trust is preferred (*t*), unless the *cestui que trust* has been guilty of such negligence that he is estopped from complaining (*u*). A lien similarly attaches to the property of a third person if he has carelessly allowed it to get into the hands of a person who could deal with it as his own as, *e.g.*, when the owner of scrip transferable by delivery intrusts it to his broker, who deposits it as security for an overdraft of his own (*r*).

No lien on trust property tortiously pledged.

(*p*) *Brandao v. Barnett* (1846), 3 C. B. 531; approved *London Chartered Bank of Australia v. White* (1879), 4 Ap. Cas. 413, at p. 422; *Vandersee v. Willis* (1789), 3 Bro. C. C. 21.

(*q*) *London Chartered Bank of Australia v. White* (1879), *ubi sup.*

(*r*) *In re European Bank, Agra*

Bank Claim (1872), 8 Ch. 41.

(*s*) *Leese v. Martin* (1874), 17 Eq. 224.

(*t*) *Manningford v. Toleman* (1845), 1 Col. 670; *Murray v. Pinkett* (1846), 12 C. & F. 764.

(*u*) *Stackhouse v. Countess of Jersey* (1861), 30 L. J. Ch. 421.

(*v*) *Goodwin v. Roberts* (1876), 1

A banker cannot realize his lien by sale (*x*) unless the property or deeds were deposited with him by way of pledge.

Solicitor's
two different
liens.

A solicitor has two different liens: one for costs incurred in a suit for which he has a charge on the fund recovered. This lien he can actively enforce. The other lien is the ordinary common law lien on documents and papers of his client for his general costs, and he can only keep this lien by retaining them. The first lien is a special lien, and the second a general lien (*y*). The solicitor's special lien on property recovered or preserved is regulated by the 28th section of the Solicitors Act, 1860, which allows the Court or judge before whom the action or proceeding has come to declare the solicitor entitled to a charge, the effect of which is to charge the property and give the solicitor a right to payment out of it. The Court can order the money to be raised and paid out of the property in any way it thinks best. The solicitor who actually is the solicitor in the action at the time when judgment is recovered has the first charge, and then any solicitor who may have acted at first, but was afterwards discharged (*z*). The general lien which a solicitor has is only in respect of papers, &c., he has received in that capacity (*a*). If there is a dispute as to what capacity he received the documents in he will not be compelled to give them up without security for his lien being given (*b*). If the solicitor gets deeds from third parties without the authority of his client he has no lien on them (*c*).

Only arises
on property
received *qua*
solicitor.

London
agent's lien.

As to London agent's lien. As against the country attorney the agent's lien is general; as against his client it is particular. In other words, as between the country

Ap. Cas. 476; *Rumball v. Metropolitan Bank* (1877), 2 Q. B. D. 194.

(*x*) *Donald v. Suckling* (1866), L. R. 1 Q. B. 585.

(*y*) *Bozon v. Bolland* (1839), 4 M. & Cr. 354.

(*z*) *In re Wadsworth* (1885), 29

Ch. Div. 517.

(*a*) *Champernown v. Scott* (1821), 6 Mad. 93.

(*b*) *Newington Local Board v. Eldridge* (1879), 12 C. D. 349.

(*c*) *Gibson v. May* (1853), 4 De G. M. & G. 512.

attorney and the agent the latter's lien extends to all costs for all agency business and disbursements due to him from the former, but as between the client and the agent the latter's lien only extends to the costs of the particular suit (*d*). If a party discharges his solicitor by his own arbitrary act he cannot obtain from that solicitor even an inspection of papers in his hands, much less delivery of them up for the purposes of the cause, without paying the solicitor's bill. If, on the other hand, the solicitor discharges the client, it is unquestionably clear that the client has a right to have inspection of the papers to an extent necessary to enable him to carry on the action with the same ease and celerity, to use Lord Eldon's expression in *Colegrave v. Manley* (*e*), as if the solicitor had not discharged him (*f*); and the solicitor is bound to hand over the papers to the new solicitor on an undertaking as to lien and re-delivery after the hearing. Sometimes an undertaking to prosecute the action diligently is required (*g*).

Change of
solicitor,
effect on lien.

The master of a ship has a maritime lien for wages and disbursements. A maritime lien does not depend, like a lien at common law, upon possession. It is the right to enforce by action in the Admiralty Courts a claim against the ship and its freight. A maritime lien travels with the thing, into whosoever possession it may come (*h*).

Master of
ship, maritime
lien.

The 191st section of the Merchant Shipping Act, 1854, gives the master the same remedies for wages as a seaman. It is stated in Williams and Bruce's Admiralty Practice (*i*), that the 191st section gives the master very little claim against the ship, because a master's wages are always fixed by special contract, and in such cases a seaman had no lien on the ship, and that the right to a lien is solely

(*d*) *Lawrence v. Fletcher* (1879), 12 C. D. 858.

(*e*) (1823), T. & R. 400.

(*f*) *Per Wigram*, V.-C., in *Griffiths v. Griffiths* (1843), 12 L. J. Ch. 397.

(*g*) *Cane v. Martin* (1840), 2 Beav. 584.

(*h*) *The Bold Buccleugh* (1850), 7 Moore, P. C. 267.

(*i*) (1886), 2nd edit.

Disburse-
ments.

by virtue of the 10th and 35th sections of the Admiralty Court Act, 1861. The House of Lords having decided (*k*), in opposition to earlier cases, that a master had no lien for disbursements, the effect of the decision was altered by an Act which gives the master "the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages" (*l*).

Stoppage in Transitu.

When an agent purchases goods for the principal, and is himself liable for the price, he has the right, if he has not been paid for them by the principal, and so long as his lien is unsatisfied on them, to stop the goods while in transit to his principal, just as if he were an unpaid vendor (*m*). This right exists until the goods have come into the hands of the principal, or of some one who warehouses them for him when the *transitus* is over (*n*). If the agent is indebted to the principal, and consigns goods to him in payment of the debt, he cannot stop while *in transitu* (*o*). No particular form or mode of stoppage is necessary, and the vendor is justified in getting back his goods by any means not criminal. All that is required is some act or declaration of the vendor countermanding delivery, the usual mode being simple notice to the carrier. If, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery, he discovers the buyer is insolvent, he may retake possession, if he can, before they reach the buyer's hands.

It is enough to claim the goods from the carrier or any person in possession, whose possession is not the con-

(*k*) *Hamilton v. Baker, The Sara* (1889), 14 Ap. Cas. 209.

(*l*) 52 & 53 Vict. c. 46, s. 1.

(*m*) *Feise v. Wray* (1802), 3 East, 93.

(*n*) *Wentworth v. Outhwaite* (1842), 10 M. & W. 436.

(*o*) *Bective v. Jewell* (1814), 4 Camp. 31.

signee's (*p*). If the goods are delivered by mistake after notice to the carrier, the consignee gets no title or property in them (*q*), for the sale is rescinded, and the vendor may bring trover for them against the person in possession. The notice must be given in sufficient time to allow the carrier to act upon it. For example, it is not sufficient to give a notice to a carrier in America, if he cannot, by due diligence, communicate it in time to his servants who have the actual custody, so as to prevent them handing the goods over (*r*).

Delivery by mistake.

Lord Ellenborough says that a mere surety has not this right (*s*); so that if the agent merely gives his name as security, he will not have the remedy; but Sir George Jessel held that the agent can, by paying the person from whom he bought on behalf of his principal, put himself in that person's shoes, and acquire his rights (*t*).

Surety no right to stop in transitu.

The authorities show that this right of stoppage *in transitu* exists until the goods are actually got home into the hands of the purchaser, or of someone who receives them in the character of his servant or agent. When the vendor knows that he is delivering the goods to someone as carrier, and who is receiving them in that character, he delivers them with the implied right, which has been established by law, of stopping them so long as they remain in the possession of the carrier as carrier (*u*).

When goods remain in the custody of the carrier, the question sometimes arises as to the capacity in which he holds them, whether he holds them for the agent or the principal (*x*); and even when they are in the hands of the

(*p*) *Northey v. Field* (1798), 2 Esp. 613.

(*q*) *Litt v. Cowley* (1816), 7 Taunt. 169.

(*r*) *Whitehead v. Anderson* (1842), 9 M. & W. 518.

(*s*) *Siffkin v. Wray* (1805), 6 East, 371.

(*t*) See *Imperial Bank v. London and St. Katharine Docks Co.* (1877), 5 C. D. 195; and 19 & 20 Vict. c. 97, s. 5.

(*u*) *Rosevear v. China Clay Co.* (1879), 11 C. D. 560.

(*x*) *Whitehead v. Anderson* (1842), 9 M. & W. 519, at p. 529; *Edwards v. Brewer* (1837), 2 M. & W. 375.

principal, a question may arise as to the capacity in which he took them, as a vendee knowing himself in difficulties may refuse to take them except on behalf of the agent (*y*). In the same way, if the goods are not appropriated, the agent may stop *in transitu* (*z*).

What notice
must be given
to stop goods.

To make a notice of stoppage *in transitu* effective, it must be given to the person actually in custody of the goods, or, if given to that person's employer, it must be given at such time and under such circumstances that the employer, by the exercise of reasonable diligence, may communicate it to the servant in time to prevent delivery to the consignee; and Baron Parke said, where he was asked to hold a notice sufficient given to a shipowner when the goods were at sea, that to do so would be the height of injustice, for it would render the employer liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible for him, owing to the distance and want of means of communication, to prevent delivery (*a*).

How right of
stoppage *in*
transitu de-
feated.

This right of the agent to stop the goods while *in transitu* can be defeated in one way only, and that is, by the principal transferring the documents of title representing the goods to a third person for value. If the transfer is only by way of pledge, then the right of stoppage *in transitu* remains subject to the pledge, and when it is paid off, the person entitled to the right of stoppage and exercising it stands in exactly the same position as to everybody else as if there had been no security, and no pledge, and no indorsement (*b*).

Except under the circumstances mentioned above, agents have no right of stoppage *in transitu*, but only a lien, which is lost when they cease to have possession (*c*).

(*y*) *James v. Griffin* (1837), 2 M. & W. 621.

(*z*) *Swanwick v. Sothorn* (1839), 9 A. & E. 895.

(*a*) *Per* Baron Parke, in *White-*

head v. Anderson, ubi supra.

(*b*) *Kemp v. Falk* (1881), 7 Ap. Cas. p. 577.

(*c*) *Kinloch v. Craig* (1789), 4 Bro. P. C. 47; 3 T. R. 119, 783.

As to the lien of a sub-agent, where no privity exists between the sub-agent and the principal, he has only a lien for his disbursements (*d*), and not the general lien which his business might give him. If the agent with whom the sub-agent is dealing is a factor, and the sub-agent does not know of any principal, he has the ordinary rights of a person dealing with a factor under the Factors Act. He has the lien of his kind of agency, whether that involves a general or special lien, and he can set up against the principal the lien he has against the agent (*e*). A sub-agent has no general lien upon the property of the principal on account of any balance due to him from the immediate agent who employs him, when he knows, or has reason to believe, that the latter is acting for another person at the time of his sub-agency (*f*).

(*d*) *Lanyon v. Blanchard* (1811), 2 Camp. 597.

(*e*) *Westwood v. Bell* (1815), 4 Camp. 349.

(*f*) Story on Agency, § 389; and see *Maans v. Henderson* (1801), 1 East, 334; *Man v. Shiffner* (1802), 2 East, 522.

Sub-agent's
lien.

CHAPTER XIII.

TERMINATION OF THE AGENCY.

Agency terminated—
(1) by act of party; (2) by act of law.

THE agency may come to an end in two different ways—either by act of the parties or by act of law.

The agency can terminate by act of the parties, as follows: the principal may dismiss the agent, the agent may renounce the agency, or else the agency terminate by mutual agreement. The agency terminates by act of law when the capacity of either the principal or the agency terminates, as by the death, bankruptcy, insanity, and also by the completion of the object of the agency.

Agency terminable at will.

The general rule is, that the principal can revoke his authority at any time, and so terminate the agency, unless there is some contract express or implied to the contrary (*a*). The fact that the principal has given the agent authority for a definite time, does not prevent him revoking the authority before the time. Thus, it was held that the fact that a principal had authorized an agent to collect debts for him at a commission for five years, did not prevent him from revoking the authority at any time, nor does an appointment of an agent for a similar period as managing owner of a ship prevent the principal from revoking such appointment (*b*).

Authority can be revoked at any time before exercised.

Thus, where a principal authorized a broker to sell some brimstone, and the agent in consequence arranged to

(*a*) Smith's Mercantile Law, 10th ed. p. 159; Story on Agency, § 463; *Henry v. Lawson* (1885), 2 Times, 199.

(*b*) *Doward & Co. v. Williams & Co.* (1889), 6 Times, 316. See also *Tasker v. Shepherd*, (1861) 5 H. & N. 575.

sell it to a third party, but before the sale note had been made out the principal countermanded the authority, Lord Ellenborough held, that no action lay for breach of contract by the purchaser, for the authority of the broker could be countermanded at any time before the memorandum of sale had been signed (*e*). In *Warwick v. Slade* (*d*) the same learned judge held that, until a binding contract had been entered into, the authority might be revoked by the principal. There a slip had been made out by underwriters on the instructions of the agent, but the principal repudiated the action of the agent before the stamped policy had been made out or signed. The agent thought himself bound in honour to go on with the insurance under the circumstance, and paid the premiums, and then brought an action to recover the money so paid, but was nonsuited on the ground that the authority had been revoked before he had made a binding contract. Lord Ellenborough laid down the rule broadly thus: When the authority is not coupled with any interest it is revocable, unless the agent has done some act which precludes the revocation of the authority (*e*).

Though the principal can revoke the agency at any time before there is a binding contract, and is not compelled to allow the agent to go on with his work so as to earn his commission, if it appears that the revocation of the authority is a trick to deprive the agent of his commission after the employer has derived the advantage of his services, the agent has a right to sue for damages, though not for commission (*f*).

It has been held that the employment of a commission agent can be determined on either side without notice (*g*);

(*c*) *Farmer v. Robinson* (1805), 2 Camp. 339, note.

(*d*) (1811), 3 Camp. 127. See also *The Findobala* (1889), 14 P. D. 50; 6 Asp. Mar. Cas. 376.

(*e*) *Bristow v. Taylor* (1817), 2 Stark. 50.

(*f*) *Noah v. Owen* (1885), 2 Times, 364.

(*g*) *Alexander v. Davis* (1885), 2 Times, 142.

Principal may have to compensate agent for terminating employment.

and in *Henry v. Loarson* (*g*), the rule is laid down broadly that a contract of agency may be revoked at the will of the principal.

Notice to agent of revocation.

It is the duty of the principal to give the agent notice of the revocation of his authority, and if he does not do so, the agent is entitled to assume that his authority is not revoked (*h*).

Authority partly exercised.

When, however, the authority has, in fact, been exercised, it cannot be revoked in respect of the acts done in exercise of it, and they are binding on the principal, for the interests of others are affected. If the authority has been in part executed, and the authority admits of severance, it can be revoked as to the unexecuted part, but not as to that executed. But if the authority is dis severable, and damage may happen to the agent through its revocation, the principal cannot revoke the authority without indemnifying the agent. When the authority of the agent is revoked the authority of the sub-agent terminates also, as he is only acting as substitute for the agent (*i*).

Public agent.

In the case of a public agent who is acting as deputy or sub-agent, it is generally arranged that his authority does not cease at the same time as the agent's. A mate's authority, too, does not terminate by the dismissal of the captain or termination of his authority, although he is often appointed by him and acts as his deputy.

Time from which revocation operates.

As between principal and agent.

The revocation of the authority of the agent by dismissal takes place from the time the agent knows of it as between himself and his employer; except in the case of his having an interest (of which presently). Mr. Justice Buller, referring to a question put in argument in *Salte*

(*g*) (1885), 2 Times, 199.

(*h*) (1884), *In re Oriental Bank*,
Ex parte Guillemin, 28 Ch. D. 654,

at p. 640.

(*i*) *Bristow v. Taylor*, *ubi supra*.

v. *Field* (*j*), as to whether those acts done by an agent before he knows of the revocation of his authority are good, says, "I think that the principal in such a case could not avoid the acts of his agent done *bonâ fide* if they were to his disadvantage; but he might consent to avoid those for his benefit."

When the authority is revoked by act of party, such revocation only affects third parties from the time the revocation is known to them, and not before. Chief Justice Holt, in deciding a case where an agent who had authority to draw bills drew several after he was dismissed, said, "If he drew bills in so little time after that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that was kept so secret that the world cannot take notice of it, the bill in those cases would bind the master" (*k*). For the principal is estopped from denying the authority where he has led third parties to believe the agent had authority, and has not informed them of the revocation (*l*).

As between principal and third party.

The authority may be revoked by the principal either expressly or impliedly, as, for instance, where he appoints another person to do the same thing instead of the agent. This presumption, of course, only arises where there is a necessary incompatibility in both persons acting as agents.

How authority revoked.

An agent's authority cannot be revoked by the principal as it may please him: if, as the result of doing so, the agent would be exposed by law to loss or suffering (*m*). The case in which this principle is illustrated is no longer good law, because all contracts as to gambling debts are made void (*n*); but the principle still applies to non-gambling contracts.

When authority irrevocable. Gambling agencies.

(*j*) (1793), 6 T. R. 211, at p. 215.

(*k*) *Anonymous v. Harrison* (1698), 12 Mod. 346.

(*l*) *Hazard v. Treadwell* (1721), 1 Strander, 506.

(*m*) *Read v. Anderson* (1884), 13 Q. B. D. 781.

(*n*) Gaming Act, 1892 (55 Vict. c. 9). See *Tatham v. Reeve*, (1893) 1 Q. B. 44.

Lord Esher, in *Read v. Anderson*, thought that an authority should only be irrevocable in "those cases in which the agent upon revocation would suffer what the law considers an injury," and that social stigma should not entitle the agent to sue for an indemnity; but the Court, in *Read v. Anderson*, held otherwise, and that case was followed (*o*), and a principal forced to indemnify a broker against the consequences (viz., being declared a defaulter) of not carrying out a contract which was void because it did not conform to Leeman's Act (*p*) by giving the numbers, but which, nevertheless, the Stock Exchange enforces. In a later case, the Court of Appeal held, however, that if the principal did not know of the custom of ignoring Leeman's Act on the Stock Exchange, since such a custom was unreasonable, the principal was not bound to indemnify the agent against the consequences of such a custom, and distinguished *Seymour v. Bridge* by saying that in that case it was held as a fact that he knew of the custom, and had authorized his agent to give the go-by to the statute (*q*). It seems, therefore, that unless the principal knows of the unreasonable custom, and authorizes the agent to conform to it, he is held to bargain with the agent that he shall make a contract which will be binding in law, and, if the agent does not do so, the principal can revoke his authority at any time before the agent has made a legal contract. The result of the principles laid down in *Read v. Anderson* appears to be that the principal's authority is irrevocable where revoking it would put the agent to serious inconvenience, or expose him to pain and suffering. But pain and suffering or loss arising to the agent from a custom which is unreasonable is not sufficient to make the authority irrevocable, unless the agent can show that the principal knew

(*o*) *Seymour v. Bridge* (1885), 14 Q. B. D. 460.
(*p*) 30 & 31 Vict. c. 29.

(*q*) *Perry v. Barnett* (1885), 15 Q. B. D. 388. See the judgment of Lord Justice Bowen.

of the custom, and consented when he employed him to be bound by it (*r*). And it would also appear that the principal is liable to indemnify an agent against any loss or suffering which would follow from not carrying out a contract he had entered into, although such loss was not a legal consequence. Gambling contracts are an exception to this rule.

Although, in general, powers of attorney and other authorities are revocable, this is not so where a power of attorney is part of a security for money, as where a man transfers a debt, and gives a power of attorney to collect it in his (the creditor's) name, there it is not revocable. So, where a power of attorney was given to levy a fine as part of a security, it was held not revocable. This principle is applicable to every case where a power of attorney is necessary to effectuate any security (*s*). Where an agent has been directed by his principal to pay money over to a third party and he has promised to do so to the third party, the authority to pay over is not revocable (*t*). Again, where a power of attorney to sell lands is given to a CREDITOR to pay his debt out of the proceeds of the sale, the power is irrevocable (*u*); for the power of attorney or authority is given for valuable consideration (*x*).

Authority
part security
for debt.

Authority
coupled with
interest.

In *Smart v. Sandars* (*y*), it was contended that a factor who had advanced money on goods had an irrevocable authority to sell. Chief Justice Wilde, in holding such an authority was not irrevocable, although the agent had an interest in the subject-matter, explained the rule as follows: "It is said a factor for sale has an authority as such (in the absence of special orders) to sell, and when he afterwards comes under advances, he thereby acquires an

To be irrevocable, authority must have been given for valuable consideration.

(*r*) *Blackburn v. Mason*, (1893) 9 Times, 286; *Cooke v. Eshelby* (1887), 12 Ap. Cas. 271.

(*s*) *Per* Lord Kenyon, *Walsh v. Whitcomb* (1797), 2 Esp. 564.

(*t*) *Hodgson v. Anderson* (1825), 3 B. & Cress. 842.

(*u*) *Gaussen v. Morton* (1830), 10 B. & C. 731.

(*x*) *Bromley v. Holland* (1802), 7 Ves. 3, at p. 28; and see *Metcalfe v. Clough* (1828), 2 M. & Ry. 178.

(*y*) (1848), 5 C. B. 895.

interest; and having thus authority and an interest, the authority becomes thereby irrevocable. The doctrine here implied, that whenever there was in the same person an authority and an interest the authority is irrevocable, is not to be admitted without qualification. In the case of *Raleigh v. Atkinson* (z), goods had been consigned to a factor for sale with a limit as to price. The factor had a lien on goods for advances, and the principal, in consideration of those advances, agreed with the factor that he should sell the goods at the best market prices, and realize thereon against advances; the Court held that this authority was revocable on the ground that there was no consideration for the agreement. Now, in that case, there was an authority given, and one which the principal was at full liberty to give; the party to whom it was given had an interest in it, yet the authority was held to be revocable. The effect of the decision was attempted in argument to be eluded by referring to the circumstance that the factor received the goods originally with a limit as to price of sale. But we do not think that circumstance material, since the limitation originally imposed was done away with by the authority afterwards given to sell at the best price. Such an authority requires no consideration to support it. An authority is, in its nature, revocable by the donor of it (*Vynior's Case* (a)); it is only when it is sought to make it irrevocable that a consideration is required to give that effect." The Chief Justice then quotes Lord Kenyon's judgment in *Walsh v. Whitcomb* (b), and, after referring to some other cases, says: "The result appears to be that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. That is what is meant by an authority coupled with an

C. J. Wilde's definition of irrevocable authority, or authority coupled with interest.

(z) (1810), 6 M. & W. 670, at p. 676.

(a) 8 Co. Rep. 82 a.

(b) (1797), 2 Esp. 565.

interest, and which is commonly said to be irrevocable. We think this doctrine applies only to cases where the authority is given for the purpose of being a security, or, as Lord Kenyon expresses it, as a part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards and incidentally only. . . . The making of such an advance (by the factor) may be a good consideration for an agreement that the authority shall be no longer revocable, but such an effect will not, we think, arise independently of agreement."

By sect. 8 of the Conveyancing Act of 1882, which came into effect on the 1st January, 1883, it is enacted—

Conveyancing
Act, 1882—
Sect. 8.
Irrevocable
authority.

"(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then in favour of a purchaser—

"(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

"(ii.) Any act done at any time by the donee of the power in pursuance of the power, shall be as valid as if anything done by the donor of the power, without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

"(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

"(2.) This section applies only to powers executed after the commencement of this Act."

Sect. 9.

Authority
irrevocable
during certain
time.

“9.—(1) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified not exceeding one year from the date of the instrument, then in favour of a purchaser—

“(i.) The power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power ; and

“(ii.) Any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened ; and

“(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

“2. This section applies only to powers of attorney created by instruments executed after the commencement of this Act.”

Definition of
purchaser
and purchase.

By sub-s. 8 of sect. 2, “purchaser” is defined to include, unless a contrary intention appears, a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property ; and “purchase,” unless a contrary intention appears, has a meaning corresponding with that of purchaser ; but sale only means a sale properly so called.

The agency may also determine by the agent refusing to act or resigning. If the agency is founded upon valuable consideration, the agent will be liable to the principal for any damages that may result from such refusal. In all cases he ought to give notice to the principal of his intention to cease acting, if he has accepted the appointment as agent (*c*). If before the time appointed for performing the contract one party gives notice to the other of his intention not to perform it, he may be charged in an immediate action as for a breach, and in that action damages may be claimed prospectively, subject to any circumstances which may operate to mitigate them (*d*).

Agent refusing to act.

The agency may determine by operation of law. The contract of agency may have been performed by expiration of the time for which it was to exist, the performance of the object of the agency, or the determination of the subject-matter. Thus, if a man has a colliery, on selling it the agency for it would, *ipso facto*, determine unless there were some special provision that it should last a certain time (*e*). Again, an auctioneer is an agent to sell, and when he has sold the agency is terminated, so that he cannot any longer represent the principal; for, as Lord Eldon said, he is then no longer the agent of the seller, and cannot, therefore, negotiate terms (*f*). But if a party enters into an arrangement that can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which the law alone can be operative (*g*). Therefore, Chief Justice Cockburn held that where an insurance company had induced the plaintiff to pay the debt of a Mr. Seton, on condition that

Determination by operation of law.

(*c*) Story, § 476.

(*d*) *Hochster v. De la Tour* (1853), 2 E. & B. 678.

(*e*) *Rhodes v. Forwood* (1876), 1 Ap. Cas. 256.

(*f*) *Seton v. Slade* (1802), 7 Ves. 264, at p. 276.

(*g*) *Per* Cockburn, C. J., *Stirling v. Maitland* (1864), 5 B. & S. 840.

Seton should remain their agent at Glasgow at a salary, out of which the plaintiff was to recoup his loan, that the company had, by selling their business, displaced Seton as their agent, and the plaintiff was entitled to have a return of his money.

It is difficult to lay down a rule as to whether in a contract it is an implied term that the agency should continue when a definite term has not been fixed (*h*).

There must be contract to employ agent, otherwise principal not liable for not employing him.

Unless there is a distinct agreement to employ the agent, the mere fact of agreeing that he should be agent for a certain number of years does not give the agent a right to be employed, and to damages, if, owing to a change of circumstances, it is impossible for the principal to employ him. Thus, in *Rhodes v. Forwood*, a colliery owner agreed with some merchants in Liverpool, to make them for seven years the sole agents for his coal in Liverpool, which they were to sell upon certain terms of commission. Before the seven years were over the colliery owner sold the colliery, and the agents then brought the action for damages for breach of contract. It was admitted by the plaintiffs that there was no clause in the agreement obliging the defendant to do business at Liverpool at all, and that he had a right to close the colliery for strikes, if he wished, or other causes. On these facts the House of Lords held that the defendant was not liable. Lord Penzance says: "A principal who wants a portion of his business transacted in any town, in which he himself does not manage it, engages an agent, and they enter in a mutual bargain, the one that he will employ no other agent, the other that he will act for no other principal. They enter into other stipulations as to prices, commission, and so forth, but that is the substance of the agreement. Upon such an agreement, unless there is some special term

(*h*) *Burton v. G. N. Ry.* (1854), 5 Q. B. 685; *Elderton v. Emmens* 9 Ex. 507; *Aspden v. Austin* (1844), (1852), 4 H. of L. Cas. 624.
5 Q. B. 671; *Dunn v. Sayles* (1844),

in the contract that the principal shall continue the business, it cannot for a moment be implied as a matter of obligation on their part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent and the commission that he may receive. In a contract of that kind there ought to be some special obligation, otherwise the natural reading of such a contract would be that, as long as the principal chooses to carry on his business, and as long as he chooses to carry on that particular portion of the business in the town of which he has appointed the agent sole agent, he shall be bound to employ the person with whom he agreed as agent for such sales, but that he shall be at liberty, when he likes to put an end to the business, to do so" (i).

If there is a distinct contract to employ the agent, the principal is liable for breach of contract in not employing him, even if he ceases to carry on the business for the purpose of which he engaged him. Thus, where a person was appointed traveller for five years to sell goods manufactured or *sold* by the defendant, it was held that it was no defence to say that the manufactory was burnt down and that the business was not going to be continued (j). Lord Justice Lindley pointed out that in *Rhodes v. Forwood* there was no express contract to employ the agent, and that such a contract could not be implied. But a distinction must be drawn between merely giving authority for a certain time and a contract to employ during that time (k).

The power of constituting an agent is founded upon the right of the principal to do the business himself, and when

Principal
liable if con-
tracted to
employ agent.

Right to have
agent depends
on right to do

(i) See Lord Penzance's judgment in *Rhodes v. Forwood* (1876), 1 Ap. Cas. 256.

(j) *Turner v. Goldsmith*, (1891) 1 Q. B. 544.

(k) *Douard & Co. v. Williams & Co.* (1889), 6 Times, 316.

subject-
matter on
own account.

Married
woman.

that right ceases, the right of appointing or of continuing the appointment of an agent already made must cease also. By marriage, a woman, under the old common law, lost all her power of contracting, and therefore her power of appointing an agent (*l*). But if a woman has separate property, and so long as she has, such marriage no more acts as a revocation of her authority than in the case of a man (*m*). The fact of a mortgagee taking possession of the business of the mortgagor is equivalent to a dismissal of the servants; and as this would occur by the default of the mortgagor, it would be equivalent to a wrongful dismissal and give a right of action. Similarly, the result of the appointment of a receiver by the Court is to discharge the servants from their service to their original employer, and an action for wrongful dismissal lies (*n*).

Death of
principal.

The death of the principal revokes the authority of the agent, and after his death the agent can no longer act in his name (*o*). Unlike a revocation of the authority by act of party, the estate of the principal is not bound until the third party, or the agent, knows of the revocation, but the authority is revoked from the moment of the death. Thus, where a man gave authority to a woman, who passed as his wife, to get what was necessary for the wants of the house, and left this country leaving her in charge of his house, the Court held his estate was only liable up to the day of his death, and not up to the time when it became known to her, which was eight months afterwards (*p*). The agent who acts under the belief that his principal is alive, is not liable on contracts made after the principal's death (*q*). At the

(*l*) *Charnley v. Winstanley* (1804), 5 East, 266.

(*m*) *McQueen's Husband and Wife*, 3rd edit., p. 30.

(*n*) *Reid v. Explosives Co.* (1887), 19 Q. B. D. 264.

(*o*) *Wallace v. Cook* (1804), 5 Esp. 116; *Watson v. King* (1815), 4 Camp. 272.

(*p*) *Blades v. Free* (1829), 9 B. & C. 167.

(*q*) *Smout v. Ilbery* (1842), 10 M. & W. 1.

same time, the Court intimated that if there had been an express contract by which the principal had bound himself, his estate would have been liable (*r*). Lord Justice Brett, in *Drew v. Nunn* (*s*), seems to think that the principal's estate should be liable in such a case until the fact of his death were known to the person to whom he had made a representation. But as it was not necessary for the purposes of the case before him he refrains from deciding it. He says: "The defendant (the principal) cannot escape from the consequences of a representation which he has made (when he has held a person entitled to act generally for him). He cannot withdraw the agent's authority without giving notice of withdrawal. The principal is bound, although he retracts the agent's authority, if he has not given notice, and the latter wrongfully enters into a contract in his behalf. . . . A difficulty may arise in the application of a general principle such as this is. Suppose that a person makes a representation which, after his death, is acted upon by another, in ignorance that his death has happened; in my view, the estate of the deceased will be bound to make good any loss which may have occurred through acting upon that representation. It is, however, unnecessary to decide that point to-day."

Mr. Justice Story is of opinion that the rule which applies to the revocation of an authority by dismissal, namely, that the authority is binding on the principal until the third party knows of it, and is binding as between principal and agent until the latter knows of the revocation, applies to revocation by death, in the case of all authorities where the act to be done is one which may lawfully be done in the sole name of the agent—such as a factor, supercargo, master of a ship—and that the authority should be binding on the estate of the principal, as between his executors and the agent, until the latter

(*r*) *Blades v. Free*, *ubi supra*.

(*s*) 4 Q. B. D. 661.

knows of the death, and as between third parties, until they know of it. In *Knowles v. Luce* (*t*), Chief Baron Manwood held the acts of an understeward, after the death of his principal and before his death was known, valid, as they were done under colour of authority; and Lord Ellenborough, in the case of *The King v. The Corporation of Bedford Level* (*u*), admitted the force of the reasoning. Owing to the uncertainty of the law as to the time from which the revocation takes effect in the case of death, and the cases of *Wallace v. Cook* (*x*) and *Watson v. King* (*y*), in which Lord Ellenborough decided that the authority was revoked from the death, the practice of conveyancers has been to have the purchase-money of an estate deposited until it was ascertained that the vendor survived the date of execution of the deed by his attorney.

Where a solicitor was entitled to receive moneys in an action, and his employer had allowed him to apply them to the payment of certain costs, it was held that, although he had received the moneys after the principal's death, he was not bound to pay them over, but only to account for them (*z*). A broker cannot set off the amount of returns of premiums which, as underwriter's agent, he was authorized to deduct, unless the returns of premiums have been actually adjusted in account between himself and his principal before his death (*a*).

Revocation by death, &c. does not affect power coupled with interest.

Conveyancing Act, sect. 47.

The revocation by death, insanity, or bankruptcy (*b*) of an authority does not apply to one coupled with an interest (*c*).

By sect. 47 of the Conveyancing Act, 1881, which came into effect on the 31st December, 1881—

“(1) Any person making or doing any payment in good

(*t*) (1579), Moore, 109, at p. 112.

(*u*) (1805), 6 East, 356.

(*x*) (1804), 5 Esp. 116.

(*y*) (1815), 4 Camp. 272.

(*z*) *Jeyes v. Jeyes* (1876), 45 L. J.

Ch. 245.

(*a*) *Houston v. Robertson* (1816), 6 Taunt. 448.

(*b*) *Alley v. Holson* (1815), 4 Camp. 325.

(*c*) Story, § 483.

. faith, *in pursuance of a power of attorney*, shall not be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become a lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy and unsoundness of mind, bankruptcy, or revocation was not, at the time of the payment or act, known to the person making or doing the same.

“(2) But this section shall not affect any right against the payee of any person interested in the money so paid, and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

“(3) This section applies only to payments and acts made and done after the commencement of this Act.”

It will be noticed that this section only applies to acts done in pursuance of a power of attorney, and does not affect the ordinary mercantile transactions where there usually is no power of attorney given.

The bankruptcy of the principal operates as a revocation of the authority of the agent touching any rights of property, of which he is divested by the bankruptcy; but any act of duty which passed no property may be exercised by attorney notwithstanding the bankruptcy (*d*). The title of the trustee in bankruptcy relates back to the act of bankruptcy. As a general rule, a power of attorney, except as provided for by the 47th section of the Conveyancing Act (*e*), is revoked by bankruptcy. The House of Lords, in *Elliott v. Turquand*, approved of the following statement of the law by Lord Justice Mellish in *Ex parte Snowball*: “We are of opinion that though no doubt a power of attorney must be treated as revoked by an act of bankruptcy committed by the

Bankruptcy of principal, revocation of authority.

(*d*) *Dixon v. Ewart* (1817), Buck.
94.

(*e*) As to commission when principal bankrupt, see p. 170.

giver of the power, still, if before the adjudication property is conveyed under the power to a *bonâ fide* purchaser who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee. It is obvious that a power of attorney is not revoked for all purposes by an act of bankruptcy committed by the giver of the power, because, if no adjudication follows, a sale under the power is binding on the giver himself; and wherever a sale would be binding on the bankrupt if no adjudication followed, it is binding on the trustee under a subsequent adjudication, if the purchaser had no notice of an act of bankruptcy having been committed by the seller at the time of the sale" (*f*). Where an authority had been given previous to an act of bankruptcy by the principal to the agent, in the course of mutual dealings, to receive the purchase-money of an estate, and to place it to account, and such authority was acted on before notice of an act of bankruptcy, it was held that the authority was not revoked, and that the payment by the third party was a good payment, that it became an item in the account between the agent and the principal, the agent being able to set it off in an action by the trustee against a debt due by the bankrupt's estate (*g*). It must depend upon the circumstances of each case at what time an account of mutual dealings and transactions is to stop, but it ought at least to be taken up to the time the person claiming the benefit of the clause with reference to the mutual dealings and credits had notice of the act of bankruptcy.

Mr. Justice Chitty held that a contract entered into by the officers of a foreign branch of a bank on behalf of the bank, without notice of winding-up, proceed, as their authority was not revoked until they had such notice (*h*).

Foreign
branch of
bank.

(*f*) *Per* Mellish, L. J., *Ex parte Snowball*, *In re Douglas* (1872), 7 Ch. 534.

(*g*) *Elliott v. Turquand* (1881), 7

Ap. Cas. 79.

(*h*) *In re Oriental Bank Corporation*, *Ex parte Guillemin* (1885), 28 C. D. 634.

In the course of his judgment, he said: "The cases of revocation by bankruptcy and death stand on a peculiar footing. Bankruptcy, for instance, divests the property, but neither the presentation of the winding-up petition, nor even the winding-up order itself, divests the company's property."

Lord Ellenborough held that an insurance broker who acted as agent for an underwriter who had become bankrupt, was not entitled to settle losses which had accrued out of the premiums in his hands belonging to the underwriter; and inasmuch as, after the bankruptcy, the bankrupt was not competent to pay or apply this fund himself in satisfaction of these claims of the assured, it followed as a consequence that he could not authorize his broker to do so, otherwise the derivative and implied authority would be stronger and more extensive than the original and principal authority of the party himself. The consequence is that the authority of the agent (the broker) was virtually countermanded and extinct by the act of bankruptcy, by which the bankrupt's own original power over the subject-matter ceased, and became transferred to others (*i*).

Insurance broker—power to settle loss after bankruptcy.

But where the agent is a factor, and has a lien on goods or the price of them, although his principal becomes bankrupt, he has a right to receive the price of them, and give a discharge for it in satisfaction of his lien (*j*). Lord Mansfield said: "We are all most clearly of opinion that a factor has a lien on the price of goods in the hands of the buyer; and in this case, though he had not the actual possession of them, yet as he had a power of giving a discharge or bringing an action, he had a right to retain the money in consequence of his lien as much as a mortgagee has by the title deeds of an estate in his hands, though not in possession."

Factor.

(*i*) *Parker v. Smith* (1812), 16 East, 382.

(*j*) *Drinkwater v. Goodwin* (1775), Cowper, 251.

Agent's
set-off in
bankruptcy.

When the principal becomes bankrupt, and his assignees sue the agent for any money of the principal in his hands, he has a right of set-off. The principle upon which the bankruptcy law acts is, that where two persons have dealt with each other on mutual credit, and one becomes bankrupt, the account shall be settled between them, and the balance alone paid on either side. The claim of set-off must be made by the party in his own right, and not as trustee for others. The object of the mutual credit section being not merely to avoid cross-actions, but to do substantial justice between the parties, where a debt is really due from the bankrupt to a debtor to his estate, and therefore the right to set off depends upon beneficial interest; hence, in bankruptcy, where a debt, though legally due by the bankrupt, is due to the creditor, not for his own benefit, but as trustee for another, the right to set off will not arise (*k*).

Insurance
broker, power
of set off.

Thus, in the case of an insurance broker, he is agent for the assured and also for the underwriter. As agent for the assured, he effects the policy and settles losses. For the underwriter, he receives the premium. If the underwriter should become bankrupt, the insurance broker cannot set off any loss that may be due on the policy against a claim for the premiums by the trustee in bankruptcy, for such claim is as trustee for the assured, and does not come within the scope of the principle of set-off above explained (*l*). He can, however, set off the amount he will have to pay on losses, if, by an adjustment before bankruptcy between himself and the underwriter, he has become authorized to detain the money to pay these debts. Where the insurance broker is under a *del credere* commission with the assured, so that he is liable personally for

(*k*) *Fair v. McIvor* (1812), 16 808.
East, 139; and see *Ex parte Cle-*
land, In re Davies (1867), 2 Ch.

(*l*) *Minett v. Forrester* (1812), 4
Taunt. 541.

the losses, he can set them off (*m*). So, also, where he has made out the policies in his own name (*n*).

In *Minett v. Forrester* (*o*), the assignees of a bankrupt underwriter brought their action against an insurance broker for premiums due on two policies of insurance. The broker claimed to set off returns of premium for short interest. It appeared that the events which entitled the broker to make this deduction had occurred in the one policy before the bankruptcy, and in the other policy not till after that event, but that no adjustment had been made on either policy. The Court held the agency of the insurance broker had been determined by the bankruptcy of the underwriter, he was not therefore entitled to set off either on one policy or the other. He could have no right of set off except on the ground of some authority to make adjustments, and that authority had been revoked by the bankruptcy.

The 38th section of the Bankruptcy Act of 1883 is as follows:—"Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled, under this section, to claim the benefit of any set-off against the property of the debtor in any case where he had, at the time of the giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him for adjudication."

Sect. 38 of
Bankruptcy
Act, 1883.

(*m*) *Lee v. Bullen* (1857), 8 El. & Bl. 692, note.

(*n*) *Parker v. Beasley* (1814), 2 M. & S. 422.

(*o*) (1812), 4 Taunt. 541.

What property of bankrupt vests in trustee.

The property of a bankrupt vests on his bankruptcy in his trustee, and is divisible among his creditors; the property thus divisible comprises *inter alia* the capacity to exercise, and to take proceedings for exercising, all such powers in, or over, or in respect of property, as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy (*p*). And also all goods being chattels at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: provided that things in action other than debts due or growing due in the course of his trade or business, shall not be deemed to be goods within the meaning of this section.

Lunacy of principal.

The effect of the lunacy of the principal upon the authority of the agent was discussed in *Drew v. Nunn* (*q*). In that case the plaintiff was a tradesman, and the principal, the defendant, had given his wife authority to deal with him, and had held her out as his agent and entitled to pledge his credit. Afterwards the principal became insane, and whilst the malady lasted, his wife ordered goods from the plaintiff, which were supplied. At the time the goods were supplied the plaintiff was unaware that the principal had become insane. Afterwards he recovered, and refused to pay for the goods. Lord Justice Brett in giving judgment said: "Upon this state of facts two questions arise. Does insanity put an end to the authority of the agent? One would expect to find that this question has been long decided on clear principles; but on looking into Story on Agency, Scotch authorities, Pothier and other French authorities, I find that no satisfactory conclusion has been arrived at. If such insanity

(*p*) Sect. 44 of Bankruptcy Act, 1883.

(*q*) (1878), 4 Q. B. D. 661. As

to the lunacy of the third party, see *Platt v. Depree* (1893), 9 Times, 194.

as existed here did not put an end to the agent's authority, it would be clear that the plaintiff is entitled to succeed; but, in my opinion, insanity of this kind does put an end to the agent's authority. It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent; thus, the bankruptcy and death of the principal, the marriage of the female principal, all put an end to the authority of the agent. It may be argued that this result follows from the circumstance that a different principal is created. Upon bankruptcy the trustee becomes the principal; upon death, the heir or devisee as to realty, the executor or administrator as to personalty; and upon the marriage of a female principal, her husband takes her place. And it has been argued that, by analogy, the lunatic continues liable until a fresh principal, namely, his committee, is appointed. But I cannot think that this is the true ground; for executors are, at least in some instances, bound to carry out the contracts entered into by their testators. I think that the satisfactory principle to be adopted is, that where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. . . . It seems to me that an agent is liable to be sued by a third person if he assumes to act on his principal's behalf after he has knowledge of his principal's incompetency to act. In a case of this kind he is acting wrongfully. . . . The second question then arises, what is the consequence where a principal who has held out another as his agent subsequently becomes insane, and a third person deals with the agent without notice that the principal is a lunatic? Authority may be given to the agent in two ways. First, it may be given by some instrument which of itself asserts that the authority is thereby created, such as a power of attorney; it is of itself an assertion by the principal that he may act for him. Secondly, an authority may also be created from the

Unless there has been holding out, agency ceases with lunacy.

Ceases as
between prin-
cipal and
agent with
lunacy.

holding out the agent as entitled to act generally for him. The agency in the present case was created in the manner last mentioned. *As between the defendant and his wife, the agency expired upon his becoming to her knowledge insane*; but it seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made on his behalf." Lord Justice Brett then discusses the reason of the rule and says: "The holding out of another person as agent is a representation upon which, at the time when it was made, third parties had a right to act, and if no insanity had supervened, would still have had a right to act. . . . The defendant cannot escape from the consequences of the representation he has made; he cannot withdraw the agent's authority as to third parties without giving notice of withdrawal. The principal is bound, although he retracts the agent's authority, if he has not given notice and the latter wrongfully enters into a contract on his behalf. The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife. He may be an innocent sufferer by her conduct, but the plaintiff who dealt with her *bonâ fide* is also innocent, and where one of two innocent persons must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and bear the loss."

Up to this we have dealt with the authority terminating by operation of law, so far as the principal was concerned, *i.e.*, by his death, marriage, bankruptcy, or lunacy. We now turn to the same events happening to the agent.

Death of
agent.

Death. This terminates the authority of the agent, for, as we have seen, that authority is a personal one and depends upon the trust and confidence reposed in him.

The authority of any sub-agent he may have appointed will also terminate on the death of the agent himself, except where by privity of contract between the principal and sub-agent other conditions for terminating the agency have been arranged or implied; or the protection of the property requires otherwise, as in the case of a ship, where the mate's authority is not terminated by the death of the master.

Marriage of a female agent does not incapacitate her from being an agent, though her husband might possibly prohibit her acting if it interfered with her duty to her family (*r*). How far he could enforce such a prohibition is doubtful. Chief Justice Holt gave leave to enter judgment where an authority had been given to a *feme sole* to confess judgment, who afterwards married, on the ground that the authority could not be deemed to be revoked by marriage, because it was for her husband's advantage (*s*).

Marriage of female agent.

By the insanity of the agent the agency must naturally determine, for no principal could intend anything done by such an agent to bind him, since, as we have seen, he relies on his skill, knowledge, and trustworthiness (*t*).

Insanity of agent.

The bankruptcy of the agent operates as a countermand of his authority to receive money on account of his principal; but it does not destroy his right to receive money on his own account in respect of a lien (*u*).

Bankruptcy of agent.

As we have seen, by bankruptcy, under the 44th section of the Bankruptcy Act, all the property of the bankrupt in which he has a beneficial interest passes to the trustee and is divisible among his creditors, with a few trifling exceptions, such as tools of his trade, bedding, &c.

A bankrupt trustee is a person unfit to act within the

Bankrupt trustee.

(*r*) Story, § 485.

(*s*) *Anon.* (1702), 1 Salk. 117.
See, also, *Marder v. Lee* (1764), 3 Bur. 1469.

(*t*) Story, § 487.

(*u*) *Hudson v. Granger* (1821), 5 B. & Ald. 27.

meaning of the 31st section of the Conveyancing Act, 1881, and such a trustee is bound to retire if requested. Sir George Jessel, in *Re Barker's Trusts* (x), said: "It is the duty of the Court to remove a bankrupt who has trust money to receive or deal with so that he can misappropriate it. There may be exceptions under special circumstances to that general rule. And it may also be that where a trustee has no money to receive he ought not to be removed merely because he has become bankrupt; but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man is more likely to be tempted to misappropriate than one who is wealthy, and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people. A bankrupt trustee may be removed under the 147th section of the Bankruptcy Act, 1883, which provides for another trustee being appointed in his place (y).

Goods in
power and
control of
bankrupt
agent.

Not only the goods of the bankrupt pass to the trustee, but also all goods being at the commencement of the bankruptcy in the possession or in the order and disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof (z). Factors and other agents have very often property of their principal in their possession; therefore it is material to consider this sub-section. It used to be considered that factors were not within this clause (a), but that it applied only to goods which a person allowed a trader to sell as his own; and accordingly, goods which had been forwarded to a factor or agent in this country for sale upon commission, were held not to pass to the assignees upon the bankruptcy of the agent, and as they were sold he was

(x) (1875), 1 C. D. 43.

(y) *Re Adams' Trust* (1879), 12 C. D. 634; *Re Renshaw* (1869), 4 Ch. 783.

(z) Bankruptcy Act, 1883, sect.

44 (2) iii.

(a) See Lord Mansfield in *Mace v. Cadell* (1774), Cowper, 232; Yate-Lee's Bankruptcy, 3rd ed. p. 404.

entitled to their proceeds less the charges paid on them by the agent (*b*).

Whether goods are in the order and disposition of the agent so as to make them or their proceeds belong to the trustee in bankruptcy, seems to depend on the notoriety of the fact of the agent acting as agent. Thus, in a case where it was notorious that the bankrupt was an agent, the chief judge held that not only the goods of the principal, but book debts owing to the agent on behalf of the principal, did not pass to the trustee in bankruptcy (*c*). And in *Ex parte Bright, Re Smith* (*d*), Sir George Jessel held that the creditors had notice sufficient to exclude the operation of the reputed ownership clause where the agent had a brass plate up outside his place of business describing himself as "merchant's and manufacturer's agent." But if the owner of goods allow the agent to carry on business as if it were apparently his own, the goods will come under the reputed ownership clause, and belong to the agent's trustee in bankruptcy (*e*).

Lord Selborne in *Ex parte Turquand* (*f*) said: "There seemed to be a misapprehension of the doctrine of reputed ownership when the existence of a custom notorious in a particular trade or business is proved, the effect of which is that everyone who knows the custom knows that articles to which it is applicable, and which are in the place where the trade is carried on, may or may not be the property of the person carrying on the trade or business—may or may not be held by him for other persons—then the doctrine of reputed ownership is absolutely excluded as to all articles which are within the scope of the custom" (*g*).

(*b*) *Re Kullberg* (1863), 12 W. R. 137. See, also, *Taylor v. Plumer* (1815), 3 M. & S. 562.

(*c*) *Ex parte Bowden, Re Wood* (1873), 28 L. T. N. S. 174.

(*d*) (1879), 10 C. D. 566.

(*e*) *In re Faucus, Ex parte Buck* (1876), 3 C. D. 795.

(*f*) (1885), 14 Q. B. D. 636.

(*g*) See, also, *Ex parte Reynolds* (1884), 15 Q. B. D. 169.

Depends on notoriety of fact of agency whether goods pass to trustee of bankrupt agent.

Lord Selborne on reputed ownership clause.

Appropriation before bankruptcy.

Again where property or proceeds of property have been appropriated to a specific purpose before bankruptcy, effect will be given to the appropriation. In such cases the property is clothed with a trust or *quasi* trust which excludes the right of the trustee in bankruptcy; as when proceeds of certain cargo are appropriated to the payment of particular acceptances, the proceeds will not go to the trustee (*h*).

(*h*) *Ex parte Flower* (1835), 4 Deac. & C. 449; *Ex parte Smith* (1834), 4 Deac. & C. 579.

CHAPTER XIV.

LIABILITY OF THIRD PARTIES TO PRINCIPAL.

THIRD parties may become liable to the principal (1) through the contract made by his agent with them, (2) and by committing torts or injuries to his property, and (3) by tampering with his agent. The principal has also a right of following his goods or the produce of them into the hands of a third party who has wrongfully obtained possession of them (*a*).

How third parties may become liable.

First, as to the rights acquired by the principal against third parties by contract. The contract may be made by the agent, as agent, in the principal's name. The principal is, in this case, the only party who can sue on the contract and enforce it (*b*). He takes, however, the contract subject to all the burdens, counterclaims, and defences that the third party may have arising, owing to the representations made by the agent while making the contract. Thus, for instance, if the agent has committed any fraud in making the same by misrepresentation or otherwise, such fraud or misrepresentation is an answer to any action by the principal on the contract.

Liability by contract.

The principal is only bound by the statements of his agent about the subject-matter of the contract, if they are made during the course of negotiating it (*c*). At any other time they are no more binding on him than the

How far statements of agent bind principal.

(*a*) *New Zealand Land Co. v. Watson* (1881), 7 Q. B. D. 374; *Kaltenbach v. Lewis* (1885), 10 Ap. Cas. 617. See Lord Bramwell's judgment.

(*b*) *Fairlie v. Fenton* (1870), L. R.

5 Ex. 169.

(*c*) *Barwick v. English Joint Stock Bank* (1867), L. R. 4 Ex. 259; *Houldsworth v. City of Glasgow Bank* (1880), 5 Ap. Cas. 317; Smith's Commercial Law, 10th ed. p. 152.

representations of a stranger (*d*). For instance, when an agent is selling a horse, what he says at the time of the sale as part of the transaction of selling respecting the horse, is evidence against the principal, but not what he says about it at another time (*e*); in the same way, what an auctioneer says at the sale binds the principal, but not at another time (*f*).

Reason of
principal's
liability for
agent's fraud.

The ground of the rule being variously put that "every person who authorizes another to act for him in the making of a contract, undertakes for the absence of fraud in that person in the execution of the authority he has given, as much as he undertakes for its absence in himself when he makes the contract" (*g*); or the master is liable for every such wrong of his servant or agent as is committed in the course of his service, because he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in (*h*).

Exception
to rule.
Principal not
liable for
agent's repre-
sentation as
to character.

There appears, however, to be one exception to the rule that a principal is liable for representations made by his agent, viz., he is not liable for representations as to pecuniary character, for by the 6th sect. of the 9 Geo. IV. c. 14, it is enacted that, in order to make a person liable on such a representation, it must be in writing signed by the person against whom the action is brought. The 6th section is as follows:—"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealing of any other person, to the intent and purpose that such other

(*d*) *Snowball v. Goodricke* (1833), 4 B. & Ad. 541.

(*e*) *Helyear v. Hauke* (1803), 5 Esp. 71.

(*f*) *Brett v. Clowser* (1880), 5 C. P. D. 376.

(*g*) *Per* L. J. Bramwell in *Weir v. Bell* (1878), 3 Ex. D. 238, at p. 245.

(*h*) *Per* Willes, J., in *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259.

person may obtain credit, money or goods upon (*sic*), unless such representation or assurance be made in writing signed by the party to be charged therewith."

Baron Bramwell, in *Swift v. Jewsberry* (i), said, "In my opinion the effect of the statute is this: that a man should not be liable for a fraudulent representation as to another person's means, unless he puts it down in writing and acknowledges his responsibility for it by his own signature. He is neither to have the words proved by word of mouth, nor the authority given to an agent, for whose act it is sought to make him responsible, proved by word of mouth." In that case, a bank was sought to be made liable for a representation made by its manager as to the credit of a customer, and the Court held it was not liable. It was argued by Mr. Day (now Mr. Justice Day), that there must be some exception put to the statute to meet the necessity of the case. To this Baron Bramwell replied: "If this were a necessary thing for the purpose of a banking company carrying on business it might be otherwise; but it is not a necessary thing for the carrying on of their business, it is no part of their business, it is a thing which can be done, and it is done, by bankers and their officers, individually and personally, therefore there is no such necessity as Mr. Day's proposition would assume."

If the principal adopts the contract of his agent and sues on it he must adopt it *cum onere* or not at all. Baron Wilde lays down the principle as follows: "Whatever his previous authority to the agent, whatever his innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether. There are, no doubt, many frauds committed by agents which could not bind their principals, but I hold that the

Principal
must accept
contract with
burdens or
not at all.

(i) *Swift v. Jewsberry* (1874), L. R. 9 Q. B. 301.

statements of the agent which are involved in the contract as its foundation or inducement are, in law, the statements of the principal" (l). The principal will have to adopt the whole contract or reject it altogether; he cannot adopt one part and repudiate the other. Lord Cranworth, in a case where an agent had acted without authority, and the principal wished to adopt the contract only so far as it was beneficial to him, said, "Where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthen" (m).

Rule applies
to company
directors.

The same rule applies to directors of companies. A company is bound by the acts of its directors, provided the acts are within the limit of the directors' apparent or real authority, and the person dealing with them is acting *bonâ fide* and has no notice of any irregularity of their proceedings. The power of the directors to bind the company is not affected by any irregularity in their appointment, if the person dealing with them acted *bonâ fide* and without notice of any irregularity, although such irregularity may prevent the company from enforcing what they have purported to do as agents of the company (n).

Principal
employing
ignorant
agent liable
for his state-
ments.

If a principal purposely employs an agent ignorant of the truth, in order that the agent may make a false statement, believing it to be true, and may so deceive the party with whom he is dealing, the representation by the agent becomes a misrepresentation by the principal, so as to vitiate the contract. Thus, where an agent was employed to sell some sheep, and the principal did not tell him that they were affected with rot, "because he was not such a fool," and the agent, being in ignorance of the fact that the sheep were so affected, said they were all right, the contract was held to be vitiated (o).

(l) *Udall v. Atherton* (1861), 7 H. & N. 172, at p. 184.

(m) *Bristow v. Whitmore* (1861), 9 H. L. 391, 404.

(n) *Garden, Gully & Co. v. M^r Lister* (1875), 1 Ap. Cas. 39.

(o) *Ludgater v. Love* (1881), 44 L. T. 694.

In the same way if the agent conceals something he knows and which he ought to tell his principal, that knowledge is imputed to the principal, and if the effect of imputing the knowledge of the agent to the principal is to make the contract a fraudulent one, then the contract is vitiated.

Affected by agent's non-disclosure of material facts.

Lord Halsbury, in *Blackburn v. Vigors* (p), discusses the proposition that knowledge of the agent is the knowledge of the principal, and said: "Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge and intentions of his principal, and whether his acts are the acts of the principal depends upon the specific authority he has received. . . . Where the employment of the agent is such that in respect to the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is correct; but it is obvious that formula can only be applied when the word 'agent' and 'principal' are limited in their application; for to lay down as an abstract proposition that every agent, no matter how limited the scope of his agency, would bind any principal even by his acts, is obviously and upon the face of it absurd; and yet it is upon the fallacious use of the word agent that plausibility is given to reasoning which requires the assumption of some such proposition." When a person is the agent to know, his knowledge does bind the principal: therefore it has been held that knowledge of a captain (q) in charge of goods, and knowledge of the con-

Knowledge of agent, knowledge of principal.

(p) (1887), 12 Ap. Cas. 531, at p. 537.

(q) *Proudfoot v. Montefiore* (1866), L. R. 2 Q. B. 511; *Gladstone v. King* (1813), 1 M. & S. 35.

Lord Mac-
naghten's
view.

signor (*r*), was knowledge of the principal; but the knowledge of an insurance agent who, though he had attempted to insure, had not acted as the agent who procured the insurance, is not the knowledge of the principal (*s*). Lord Macnaghten expressed himself adverse to extending the doctrine of constructive notice, and said that though there was nothing unreasonable in imputing to a shipowner who effects an insurance on his vessel all the information with regard to his own property which the agent to whom the management of the property is committed possessed at the time, but it was different when the agent whose knowledge it is sought to impute to the principal is not the agent to whom the principal would look for information.

Blackburn v.
Vigors, facts
of.

In *Blackburn v. Vigors*, the principal employed a broker to insure. Before the broker effected the insurance material facts came to his knowledge which affected the risk. These facts he did not communicate to the principal. The principal afterwards effected an insurance through another broker, and it was held that he was not affected by the knowledge of the first broker. Lord Halsbury asked: "How is it possible to suggest that the assured could rely upon the communication of every piece of information acquired by an agent through whom the assured has unsuccessfully attempted to procure an insurance?" In *Blackburn v. Haslam*, the brokers entered into the negotiations for the insurance without knowing of anything beyond that the ship was overdue. After they had made the offer they received information that she was in fact lost; they did not communicate this fact to the principal. They then accepted the proposal of the underwriters in the principal's name. Under these circumstances the knowledge of the brokers was held to be the knowledge of the principal.

(*r*) *Fitzherbert v. Mather* (1785),
1 T. R. 12.

(*s*) *Blackburn v. Vigors* (1887), 12
Ap. Cas. 531; see also *Blackburn v.*
Haslam (1888), 21 Q. B. D. 144.

In *Bawden v. London, Edinburgh, &c. Assurance Co. (t)*, Knowledge of the knowledge of the insurance agent was held the knowledge of the principals. There the insurance proposal, which was against accidents, contained a statement that the insured had no physical infirmity; and it was contended for the assurance company that this was the basis of the contract. It appeared, however, that the insured could not read and write, and that the agent knew the fact that the insured had only one eye, but did not tell the company. Nearly three years afterwards, the insurer lost his second eye, and claimed for a permanent total disablement. The Court held that the proposal must be construed to have been negotiated and settled by the agent with a one-eyed man, and held the insurance company were liable.

Knowledge of insurance company's agent.

A person who has been induced to give more for property than he otherwise would have by a representation made by an agent is entitled to compensation if he complains before completing the contract; but after the contract is executed he has no remedy against the principal (u).

Unauthorized innocent misrepresentation.

In *Brett v. Clowser (x)* an auctioneer, being misled by a plan innocently, while selling a public-house, represented there was a right of way from it to Hampstead Heath. The purchaser did not take any action against the vendor (the principal) until after the completion of the purchase, and it was then held too late.

As the principal is liable to the third party for the fraud of his agent, so the third party is liable to the principal for any fraud or misrepresentations which induced the agent to enter into the contract on behalf of his principal.

Liability of third party when contract made in name of agent.

The contract may be made in the name of the agent. When the contract is by deed, and purports to be the deed of the agent, then the principal cannot sue upon

Deed executed by agent in his own name.

(t) (1892) 2 Q. B. 534.

P. D. 376.

(u) *Brett v. Clowser* (1880), 5 C.

(x) *Ubi supra*.

it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named and described in it as parties (*a*). See, however, the 46th section of the Conveyancing Act, 1881, which allows the donee of a power of attorney to execute a deed in his own name, and which provides that it shall be as effectual to all intents as if it had been executed or done by the donee of the power in the name and with the signature of the donee thereof.

General rule. Sir Montague Smith said (*b*): "Speaking generally, an undisclosed principal may sue or be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities of which notice may exist against the agent (*Higgins v. Senior* (*c*); *Calder v. Dobell* (*d*)). There seems no sufficient ground for making a distinction in the case of a marine policy of insurance, especially when, having regard to the ordinary course of business, it must be known that they are commonly made by agents." In the case before him, the actual policy had not been issued, but only a certificate of insurance, which stated that the agent (mentioning his name) had effected the insurance, and which certificate had *not* the ordinary words, "I, A. B., as well in my own name as for and in the names of all or every other person or persons whom the same doth, may, or shall appertain, in part, or in all;" the Court held that though these words were not contained in the certificate, it ought to be construed with regard to the proved usage, viz., to treat such a document as provisional, and entitling to a policy in the common form, and that the principal could therefore sue.

Principal
must prove
he was real

Lord Denman, in *Sims v. Bond* (*c*), said, "It is a well established rule of law that where a contract not under

(*a*) *Beckham v. Drake* (1841), 9 M. & W. 79, at p. 95.

(*b*) *Browning v. The Prov. Insurance Co. of Canada* (1875), L. R. 5

P. C. 263, at p. 272.

(*c*) (1841), 8 M. & W. 834.

(*d*) (1871), L. R. 6 C. P. 486.

(*e*) (1833), 5 B. & Ad. 389.

seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. . . . But where money is lent by another in his own name, the plaintiff, who alleges that he was in reality the lender, must prove the fact distinctly and clearly. He must show that the loan, though nominally that of another, was really intended to be his own (*f*).

party to contract.

If the agent has contracted as principal, the principal cannot sue, as it is not his contract, and there is no privity (*g*). So, also, where the sub-agent who has not been appointed with the principal's authority makes a different kind of contract with the third party, the principal cannot sue on it (*h*); the fact that he has done so being evidence that the agent contracted as principal.

When agent contracted as principal.

If the agent has commenced an action, the principal can still intervene at any stage, and after his intervention the right of the agent to sue ceases (*i*), unless the principal is indebted to the agent, or the agent has a lien on the goods or their proceeds, in which case the agent's right is superior (*k*).

If agent commenced action principal can intervene.

The principal can sue the third party, either in his own name or in that of the agent. If he sues in that of the agent he is liable to have a defence set up which may be good only as against the agent, and so he may be defeated. Thus, where a principal sued in the name of his insurance broker for the amount of a loss, a settlement in account between the broker and the third party was held

Principal can bring action in his own name or in agent's.

(*f*) See also *Cooke v. Sealey* (1848), 2 Ex. 746.

(*g*) *Humble v. Hunter* (1848), 12 Q. B. 310.

(*h*) *New Zealand Land Co. v. Watson* (1881), 7 Q. B. D. 374.

(*i*) *Sadler v. Leigh* (1815), 4 Camp. 195.

(*k*) *Hudson v. Granger* (1821), 5 B. & Ald. 27; *Drinkwater v. Goodwin* (1775), Cowp. 251.

a good defence. C. J. Denman said: "The plaintiff, though he sues as trustee of another, must, in a court of law, be treated in all respects as a party in the cause; if there is a defence against him, there is a defence against the *cestui que trust* (the principal), who uses his name, and the plaintiff cannot be permitted to say, for the benefit of another, that his own act (the settlement in account) is void which he cannot say for himself" (i).

Foreign principal suing in agent's name can be forced to give discovery.

If a foreign principal sues in his agent's name, and the agent has been treated as making the contract only as agent, then the action brought in the agent's name will be stayed unless the principal gives discovery (k). The present Master of the Rolls, Lord Esher, said: "I am prepared to decide that, where it is known to the Court that there is a foreign principal residing abroad, who is the real plaintiff in the action, and is only suing through his agent here, and that agent was dealt with by the other side as agent, and not as principal, then, in order to prevent palpable injustice, the Court, by reason of its inherent jurisdiction, will insist that the real plaintiff shall do all that he ought to do for the purposes of justice, as if his name were on the record. It is true the Court cannot make an order on him such as is here asked for (discovery), but it can say that the nominal plaintiff shall not proceed with the action till the real plaintiff has done that which, had he been a party to the action, he might have been ordered to do."

Principal in action cannot dispute agent's apparent authority.

As against third parties, the agent has the authority that the principal held him out to have. Therefore, if the principal is suing the third party, he will be estopped from disputing that the agent had the authority that he was apparently held out to have. Thus, a person entrusting goods to an auctioneer, as such, will not be allowed to dispute his right to do what comes within the ordinary

(i) *Gibson v. Winter* (1833), 5 B. & Adol. 96; see also *Duke of Norfolk v. Worthy* (1808), 1 Camp. 337.

(k) *Willis & Co. v. Baddeley*, (1892) 2 Q. B. 324.

business of an auctioneer (*l*). And a person employing a stockbroker on the Stock Exchange authorizes him to act according to the ordinary rules of the Stock Exchange (*m*).

Mr. Justice Blackburn explains the law as follows (*n*):—
 “At common law a person in possession of goods cannot confer on another, either by sale or pledge, any better title to goods than he himself had. To the general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was, that to make either a sale or a pledge valid against the owner of goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to pledge or sell, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded against those who were induced *bonâ fide* to act on the faith of that apparent authority from denying that he had given such authority, and the result as to this was the same as if he had really given it.”

If the principal so acts that the third party thinks the person dealing with goods or property has a right to do so, he will be estopped from denying that the person had authority, or from proving the act was without authority, if the third party has altered his position in consequence. Thus, where a person (*o*) who had a mortgage on goods, allowed them to be sold without saying anything about it, he was held not entitled to recover them back. Lord Denman said: “The rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous posi-

Principle of
estoppel.

(*l*) *Pickering v. Busk* (1812), 15 East, 38.

(*m*) *Harker v. Edwards* (1887), 57 L. J. Q. B. 147.

(*n*) *Cole v. London and North Western Bank* (1875), 10 C. P. 354.

(*o*) *Pickard v. Sears* (1837), 6 Ad. & El. at p. 469.

tion, the former is concluded from averring against the latter a different state of things as existing at the time. . . . We think the plaintiff's conduct, in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature that the opinion of the jury ought, in conformity with *Heane v. Rogers* (*p*), and *Graves v. Key* (*q*), to have been taken whether he had in fact ceased to be owner."

Payment to agent, when good.

If the third party relies on a payment to the agent, he must show that the agent had authority to receive payment, and that the payment was made in such a way that it could be handed over by the agent, and not by way of set-off, or by a cheque which included payments to the agent (*r*).

Estoppel in mercantile agent.

In mercantile agency, the principle of estoppel works very large and far-reaching results, for some agents, being entrusted by the owners of goods with the possession of them, or the documents of title relating to them, are able to appear to third parties as if they were the actual owners of the goods in their possession. Factors, in the usual course of their business, are entrusted with goods of others, and sell in their own name. If a principal therefore employs a factor to sell goods, and entrusts him with his goods, or the documents of title, the principal is estopped from denying the factor's authority, although he may have violated his instructions, and sold them at prices not authorized, provided always, that the sale were one which the factor might have made while acting in the ordinary course of business (*s*). On the same principle, it has been held that a person with authority to sell goods has implied authority to receive payment for them (*t*), and that where a factor sells goods, although he is known to be acting as

Protects purchaser, though factor violated authority.

(*p*) (1829), 9 B. & C. 577.

(*q*) (1832), 3 B. & Ad. 313.

(*r*) See "Authority of Agent," p. 72 and following, and *Pearson v. Scott*, (1878), 9 C. D. 198; *Papé*

v. Westacott (1893), 10 Times, 51.

(*s*) *Pickering v. Busk* (1812), 15 East, 28.

(*t*) *Cupel v. Thornton* (1828), 3 Car. & Payne, 352.

agent, payment to him is good, even if made before payment is due (*u*).

The next result of the principle of estoppel is to allow a purchaser from a factor, if he believes the agent is the owner of the goods, to set off a debt that the agent may owe him when paying for the goods. For he may have chosen to make a purchase from the factor (whom he believed to be a principal) merely for the sake of trying, by setting off the price of the goods he has purchased, to obtain payment of a debt which the factor owed him. And it is felt that it would be unjust if, after he had done this, the principal could intervene and insist upon payment in full. It was, therefore, decided that where a purchaser has dealt with a factor in the belief that he is principal, and for the purpose of setting off against the price of the goods a debt of the factor's to him, he can use the set-off against the principal in an action for the price of the goods (*v*). The right to set off only arises where the purchaser believed at the time of the purchase that he was dealing with a principal; if he has notice that the goods are not the seller's own goods, but that of some one else, the right to set off does not arise (*x*).

Gives purchaser right of set-off.

Before the Factors Act of 1889 was passed the third party setting up the right to set off had to prove that the factor had been entrusted with the goods by the principal in his capacity as factor, *i. e.*, agent for sale. If the entrusting had been in any other capacity, as for instance as warehouseman, the right to set off did not arise (*y*). The effect of this was, that in many cases persons dealing with factors on the faith of their apparent position of owners were defrauded, and obliged either to return the goods or pay for them a second time.

Before Factors Act, 1889, had to prove factor had possession as factor.

(*u*) *Fish v. Kempton* (1849), 7 C. B. 687.

(*v*) *George v. Claggett* (1796), 2 Smith's Leading Cases, 9 ed. p. 130.

(*x*) *Ex parte Dixon, In re Henley* (1878), 4 C. D. 133.

(*y*) *Cole v. London & N. W. Bank* (1875), L. R. 10 C. P. 354.

What purchaser must prove now.

Now, by the Factors Act, 1889, a person dealing with a mercantile agent, who in the ordinary course of his business has authority to sell goods, is protected provided the factor or mercantile agent is in the possession of the goods with the consent of the owner, and is acting in the ordinary course of his business.

Factor no right to pledge at common law.

Mr. Justice Blackburn, in the account he gives of the law of estoppel in *Cole v. London & North Western Bank* (z), assumes a case where the owner of goods might have so acted as to clothe the pledger with apparent authority to pledge, and would therefore, at common law, be precluded from denying such authority. The writer has found no case in which it has been held that the owner of goods had so acted as to clothe an agent with apparent authority to pledge. In the case of a factor who is agent to sell, it might have been assumed that an authority to do the greater, viz., to sell, would have included an authority to do the less—to pledge. But although it is constantly necessary for factors to pledge the goods entrusted to them for the purposes of their employers, it was held at common law that an agent having general authority to sell has no authority to pledge (a), and that if he pledge the goods as his own the act was so tortious as not to transfer to the pledgee even the lien which the factor himself had for advances on the goods (b).

When factor has right now.

To obviate the inconvenience of these decisions, and to facilitate mercantile transactions, the Factors Act of 1842 (5 & 6 Vict. c. 39) was passed, which gave factors an implied authority to pledge. This right to pledge has been amplified and improved by the Factors Act, 1889, which repeals all the other Factors Acts.

The law is thus stated by Lord Chief Justice Wilde (c):
“Where goods are placed in the hands of a factor for sale,

(z) *Ubi supra*.

(a) *Paterson v. Tash* (1742), 2 Strange, 1178.

(b) *McCombie v. Davies* (1805), 7 East, 5.

(c) *Fish v. Kempton* (1849), 7 C. B. 687.

and are sold by him under circumstances that are calculated to induce and do induce a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character that he himself has allowed the factor to assume did not belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller. But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another."

It would seem from the principle of estoppel, that it ought to be necessary for the third party to show that he would not have made the contract if he had known the agent was not a principal, or that he had been otherwise damnified by the principal's conduct in holding out the agent as the owner of the goods. The mere fact of the agent having acted in his own name and being in possession of goods, ought not to enable the third party to pay himself with the principal's money or goods. It does, however, not seem necessary to prove either the one or the other: if a person appears to act as principal, a person who *bonâ fide* enters into any contract with him as principal may set off any demand he may have on him as against a claim on the contract, and this principle does not apply only to contracts for sale or purchase of goods, but to any contract (*d*).

Extent to which set-off extends.

To establish this right of set off, the third party must prove that the agent or person with whom he contracted was given the goods by the principal; that the person sold them as his own goods in his own name as principal, with the authority of the real principal; and thirdly, that the third party dealt with him and believed him to be prin-

What third party must prove to establish right of set-off.

(*d*) *Montagu v. Forwood* (1893), 9 Times, 634; (1893) 2 Q. B. 350.

Set-off at
common law
of mutual
claims.

principal in the transaction, and that, before the third party was undeceived in that respect, the right accrued (*e*).

At common law there was no right of setting up a set-off as a defence, unless there was some agreement between the parties to that effect; but by usage of some traders set-offs were binding as part of the contract. By two Acts of 2 Geo. II. c. 22, s. 13, and 8 Geo. II. c. 24, s. 4, mutual debts might be set off apart from any agreement. These Acts have now been repealed by the 24th section of the Judicature Act, which now allows the Court to grant any relief that the defendant claims in his pleading which the Court could have granted if the defendant had brought an action for that purpose.

Effect of
entrusting
agent with
negotiable
instruments.

Where negotiable instruments are entrusted to an agent for sale, the third party can refuse to give them up without being paid the amount he has advanced on them in good faith (*f*). If, however, the third party knows that they are given to the agent only as security for money, he can only hold them for the amount of the money secured on them, whatever that may be (*g*).

The third party, in order to come within the principle of *George v. Clagett* (*h*),—that a *bonâ fide* purchaser from an agent has a right of set-off—in those cases to which the Act does not apply (*i.e.*, where the agent has not possession of the goods or the documents of title to them with consent of the owner), has to show that he believed the agent (who was allowed to hold himself out as principal by the real owner of the goods) was a principal, and he dealt with him as such; but the third party is not bound to show that he had no means of knowledge that the seller

(*e*) *Semenza v. Brinsley* (1865), 18 C. B. N. S. 467, at p. 477.

(*f*) *London Joint Stock Bank v. Simmons*, (1892) Ap. Cas. 201; see Lord Herschell's judgment, pp. 214—217. See also *Goodwin v.*

Robarts, 1 Ap. Cas. 476.

(*g*) *Sheffield v. London Joint Stock Bank* (1888), 13 Ap. Cas. 333.

(*h*) (1796), Smith's Leading Cases, 9th ed. 130.

was an agent (*i*). If he knows the agent is not a principal, it does not matter how he acquired that knowledge.

Knowledge, however obtained, that goods were not the property of the person dealing as principal prevents the advancer from having a lien for advances made after such knowledge, because it is unjust, with knowledge, to take one man's goods to pay another's debt (*j*).

As we have seen, a broker is not like a factor in possession of goods, and does not usually sell in his own name: he only negotiates sales (*k*). Therefore the principal is not held to have given him such a large authority, and is not estopped in the same way. Broker.

To establish this right of set-off, where the agent is a broker, it is not sufficient for the third party to prove that he acted in ignorance as to whether the agent was a principal or not, or with no belief one way or other; he must prove that at the time he had a positive belief that he was dealing with a principal. Ignorance of fact of being agent not sufficient.

Thus, in *Cooke v. Eshelby* (*l*), where the third party could not go further than saying that he did not know for whom the agent was acting, it was held that was not enough; that to acquire the right of set-off he must have believed the agent was a principal; it is not sufficient to contract having no opinion one way or other. Lord Watson said: "A sale by a broker in his own name to persons having that knowledge" (*i.e.*, that he was a broker) "does not convey to them an assurance that he is selling on his own account; on the contrary, it is equivalent to an express intention that the cotton is either his own property or the property of a principal who has employed him as an agent to sell. The purchaser who is content to buy on these terms cannot, What third party must do to establish right of set-off when agent broker.

(*i*) *Borries v. Imperial Ottoman Bank* (1873), 9 C. P. 38.

(*j*) *Mildred v. Maspons* (1883), 8 Ap. Cas. 885.

(*k*) *Baring v. Corrie* (1818), 2 B. & Ald. 137.

(*l*) (1887), 12 Ap. Cas. 271.

when the real principal comes forward, allege that the broker sold cotton as his own. If the intending purchaser desires to deal with a *broker* as a principal, and not as an agent, in order to secure a right of set-off, he is put upon his inquiry. Should the broker refuse to state whether he is acting for himself or for a principal, the buyer may decline to enter into the transaction. If he chooses to purchase without inquiry, or notwithstanding the broker's refusal to give information, he does so with notice that there may be a principal for whom the broker is acting as agent, and should that ultimately prove to be the fact, he has, in my opinion, no right to set off his indebtedness to the principal against debts owing to him by the agent." Lord Watson then commented on the cases, and continued: "These decisions appear to me to establish conclusively that in order to sustain the defence pleaded by the appellants (*i.e.*, that they had a set-off against the agent) it is not enough to show that the agent sold in his own name. It must be shown that he sold the goods *as his own*, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce in the mind of the purchaser, a reasonable belief that the agent was selling on his own account and not for an undisclosed principal; and it must be shown that the agent was enabled to appear as the real contracting party by the conduct or by the authority, express or implied, of the principal. The rule thus explained is intelligible and just, and I agree with Lord Justice Bowen that it rests upon the doctrine of estoppel."

Set-off of
bank for
advances to
money-lender.

On the same principle, it was held that a bank which had dealings with a money-lender, and knew the securities which he pledged were probably not his own but his client's, could not hold them for more than what the money-lender had advanced on them (*m*).

(*m*) *Sheffield v. London Joint Stock Bank* (1868), 13 Ap. Cas. 333; *London Joint Stock Bank v. Simmons*, (1892) Ap. Cas. 201.

Except where the third party knows the deeds or documents are not the agent's, the principal can only recover them subject to paying what the agent has pledged them for. So it has been held that if the legal owner of deeds intrusts them, or the control of them, to an agent in order that he may receive money on them, he cannot in equity recover them from a person who has *bonâ fide* advanced money on them without notice of anything wrong except upon terms of paying what that person has advanced on the security of the deeds handed over to him (*n*). And, therefore, the Court of Appeal held that if an owner of deeds has placed them under the control of another, and has authorized him to pledge them for a certain sum, and the agent has pledged them for more with a person dealing *bonâ fide* and without notice of the limits of his authority, the owner of the deeds cannot redeem them without paying the full amount advanced on them (*o*).

Owner of deeds who has lent them can only recover on payment of advance.

The right of the third party to set off a debt of the agent against the price of goods only arises if he believes *at the time of the advance* to the agent that he was dealing with a principal; and it follows that if before making the advance he knows the fact that he is dealing with an agent, *cessante ratione cessat ipsa lex* (*p*). Lord Justice Lindley, in *Maspous v. Mildred* (*q*), states the law thus: "According to our law the right of the defendants to a lien or set-off depends on a question of fact, viz., whether the defendants did or did not know that Demestre & Co. were acting for an undisclosed principal before the defendants' alleged lien or right of set-off accrued." Lord Watson laid down the rule thus (*r*): "The purchaser from an

If third party before advance knows of true ownership, no set-off or lien.

(*n*) *Northern Counties Fire Insurance Co. v. Whipp* (1884), 26 C. D. 492, 493, 494.

(*o*) *Brocklesby v. The Temperance Building Society* (1893), 9 Times, 561.

(*p*) *Smith's Mercantile Law*, 10th ed. p. 166.

(*q*) (1832), 9 Q. B. D. at p. 543; affirmed 8 Ap. Cas. 874.

(*r*) *Kaltenbach v. Lewis* (1884), 10 Ap. Cas. 617, at p. 626.

agent selling in his own name for an undisclosed principal transacts, or is presumed to transact, on the faith of his having the right to set off the price payable by him against debts owing to him by the seller, yet he cannot avail himself of such set-off arising after notice of the true ownership." (Since that decision the word "liability" has been included in the new Factors Act, which would slightly alter the decision in this case, though not the above principle.) It seems, where a third party buys for the purpose of having a set-off, the right of set-off accrues directly on the contract. Where having bought, as he thought, from a principal he then learns that he was dealing with an agent, and he afterwards makes advances, the advances, except so far as they were for the principal's benefit, cannot be set off against the price of the goods or what represents them, such as insurance money ^(s).

No set-off of
pledge to
secure ante-
cedent debt.

If the agent has pledged the goods or documents of title thereto for an antecedent debt, or a liability due by him before the time of the pledge, it will give the person who receives them in pledge no further title to the goods than the agent had at the time of the pledging ^(t); for the third party has not been induced to act differently by the principal's conduct than he otherwise would have, since he gave the agent credit not on faith of his being owner of the goods.

Goods must
have come
into posses-
sion of agent,
quà agent, to
create set-off.

If the goods have come into the possession of the agent in some other capacity than as agent, unless the agent is a mercantile agent (see p. 232), the principal is not estopped from claiming them or their value. For example, if a furnished house is let to one who carries on the business of an auctioneer, he is intrusted *as tenant* with the furniture, being, in fact, auctioneer. It never was the common law, and could not be intended to be enacted, that if he carried the furniture to his auction room and

^(s) *Mildred v. Maspons* (1883), 8
Ap. Cas. 874; see also *Maass v.*
Henderson (1801), 1 East, 335.

^(t) *Mildred v. Maspons* (1883), 8
Ap. Cas. 874, at p. 885.

there sold it, he could confer any better title on the purchaser than if he had as auctioneer acted for some other tenant who committed a similar larceny as a fraudulent bailee; nor, to come nearer the present case, that a warehouseman or wharfinger who as such is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give him a better title by the sale of goods than he could if they had been intrusted to some other warehouseman who employed him to sell (*u*).

The Factors Act begins by defining the kind of agents it applies to—mercantile agents—"a mercantile agent having in the customary course of his business as such agent authority either (a) to sell goods; (b) to consign goods for purpose of sale; (c) or to buy goods; (d) or to raise money on the security of goods" (*v*). Under the old Acts, a clerk who had authority to sign delivery orders in his employer's name and receive dock warrants in his own name was decided not to be within the Factors Act; since, as Crompton, J., pointed out (*x*), the establishment of the relation of principal and agent was contemplated, and fell short of including the relationship of master and servant (*y*), and the same reasoning applies to the present Act. The policy of the Acts, however, extends to agents who are not factors strictly speaking, as is clear from the definition clause, although it does not to persons in the relationship of master and servant to one another. Mr. Justice Mathew decided, in *Hastings v. Pearson*, that the Act did not apply to a person employed to hawk about and sell goods on commission (*z*). After reading the definition clause, he said: "It was plain that the Act applies only to persons of the class ordinarily carrying on the business of mercantile agents, and that it has no reference to a

Factors Act,
1889 (52 & 53
Vict. c. 45).
What agents
it applies to.

Not to clerk.

(*u*) Per Lord Blackburn in *Cole v. L. & N. W. Bank* (1875), 10 C. P. 369.

(*v*) Sect. 1, sub-s. 1.

(*x*) *Lamb v. Attenborough* (1862), 1 B. & S. 831, 835; and see *Baines*

v. Swainson (1862), 32 L. J. Q. B. 281, per Crompton, J., at p. 288.

(*y*) For definition of agent, see pp. 1, 2.

(*z*) *Hastings v. Pearson*, (1892) 1 Q. B. 62.

man in such a position as Brooke (the agent who hawked jewellery) was. There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent." This case and the definition in the Act both seem to point to the conclusion that a third party dealing with a person employed for the first time to do a particular kind of business which was not his ordinary business is not entitled to the benefit of the Act. Wharfingers and others who receive goods only for safe custody are clearly not within the Act (a).

What kind of possession necessary.

The Act next defines "possession," and enacts that "a person shall be deemed in possession of goods or of documents of title to goods where (a) the goods or documents are in his actual custody, (b) are held by any other person (1) subject to his control; or (2) for him; or (3) on his behalf." Under the similar section in the Act of 1842 this was held to include the kind of possession a mortgagor has who has pledged goods for less than their full value (b).

What are documents of title.

Documents of title are defined to include (1) "any bill of lading; (2) dock warrants; (3) warehouse-keeper's certificates; (4) warrant or order for delivery of goods; (5) and any other document used in the ordinary course of business as proof (a) of the possession, (b) or control of goods; or (6) authorizing or purporting to authorize, either (a) by endorsement or (b) delivery, the possessor of the document to transfer or receive goods thereby represented." A document certifying only where goods are is not included (c); but warrants for goods deliverable to A. B., or to his assigns by indorsement, are within the Act (d).

(a) *Monk v. Whittenbury* (1831), 2 B. & Ad. 484.

(b) *Portalis v. Tetley* (1867), L. R. 5 Eq. 140.

(c) *Gunn v. Bolekow* (1875), 10 Ch. Ap. 491.

(d) *Merchant Banking Co. v. Phoenix, &c. Co.* (1877), 5 C. D. 205.

“Pledge” shall “include any contract pledging or giving a lien or security on goods, whether in consideration of an original advance or of any further or continuing advance, or of any pecuniary liability.”

“Person” is defined as including any body, whether corporate or not.

The Act then provides that “where a mercantile agent is with the consent of the owner in possession of goods, or of the documents of title to goods,” then any “sale, pledge, or other disposition of the goods made by him *when acting in the ordinary course of business of a mercantile agent*, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: provided that the person taking under the disposition acts (a) in good faith, and (b) has not at the time notice that the person making the disposition has not authority to make the same” (d). Mr. Justice Blackburn (e), when dealing with the old Acts, pointed out what it is submitted is equally true under the present one, namely: “It must be intended to apply only to cases in which the *intrusting* is in the course of that kind of agency so as to create the relation of principal and agent between the intrustor and the intrusted For example, if a furnished house be let to one who carries on the business of an auctioneer, he is intrusted *as tenant* with the furniture, being, in fact, an auctioneer; but it never was the common law, and could not be intended to be enacted, that if he carried the furniture to his auction room, and there sold it, he could confer any better title on the purchaser than if he had as auctioneer acted for some other tenant who committed a similar larceny as a fraudulent bailee; nor that a warehouseman or wharfinger who as such is intrusted with the custody of goods, if he happens also to pursue

When disposition of goods valid.
Sect. 2,
sub-s. 1.

Intrusting must be as agent.

(d) Sect. 2.

(e) *Cole v. North-Western Bank*
(1875), L. R. 10 C. P. 369.

the trade of a factor, can give a better title by sale of the goods than he could if they had been intrusted to some other warehouseman who employed him to sell." It has already been pointed out that the "disposition" must have been in the ordinary course of his business (*f*). If the principal did, in fact, intrust the agent as an agent, though induced to do so through stating untruly that he wanted to sell them to a particular person, or by a fraud, it is immaterial so far as third parties are concerned (*g*). If a person taking under the disposition learns or has notice that the mercantile agent is only an agent, and knows the particular "disposition" is for the agent's own personal benefit, and not for his principal, he could, it is submitted, not be acting in good faith, and would only take what interest the agent had, or to the extent that he had himself a claim, which would be good as against the principal, such as premiums, stamps, and commission, and it seems, under the circumstances, he would have notice that the agent was acting without authority. The distinction between notice and knowledge which Lord Blackburn raised in *Mildred v. Maspons* (*h*) would hardly arise under the present Act, since if a person had knowledge he could hardly act in "good faith."

What notice
of principal
destroys
set-off.

Lord Blackburn held then that it was not necessary that there should be notice of the name of the person having an interest, but only that there is a person having such an interest. On the other hand, it is submitted that it would not be sufficient to prevent the disposition being valid (in a case to which the Act applies) to prove that the person dealing with the agent knew that the agent sometimes acted as agent, and that the third party never asked or considered in what capacity the agent was acting

(*f*) *Hastings v. Pearson*, (1892) 1 Q. B. 62.

(*g*) *Baines v. Swainson* (1862), 32 L. J. Q. B. 281; *Sheppard v. Union Bank* (1861), 31 L. J. Ex. 154; see

also *Kingsford v. Merry* (1856), 26 L. J. Ex. 83; *Hardman v. Booth* (1862), 32 L. J. Ex. 105.

(*h*) (1883), 8 Ap. Cas. 885.

at the time of the disposition, *Cooke v. Eshelby* not being decided under the Factors Acts (*i*).

“Where a mercantile agent has, with the consent of the owner, been in possession of goods or documents of title to goods, any sale, pledge, or other disposition which would have been valid if the consent had continued shall be valid notwithstanding the determination of the consent, provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.”

Disposition of agent notwithstanding revocation of authority. Sect. 2, sub-s. 2.

This sub-section makes valid a disposition where a person has dealt in good faith with a mercantile agent who still remains with the goods or documents of title to goods in his possession at the time of the disposition, although his original authority has been withdrawn by his principal. At common law the disposition, whatever it was, would, under such circumstances, have been invalid, and the owner of the goods entitled to recover them or their proceeds (*k*).

“Where a mercantile agent has obtained possession of any documents of title to goods by (a) reason of his being, or having been with the consent of the owner, in possession of goods represented thereby, (b) or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.” The object of this section, which is only a re-enactment of sect. 4 of the Act of 1842, is to further protect a person dealing *bonâ fide* with a mercantile agent. For example, the agent may have been entrusted with goods for sale and thereby have obtained dock-warrants, or else may have been entrusted with the bill of lading and so have got the dock-warrants to the goods made out in his name,

Sect. 2, sub-s. 3. Definition of possession with consent of owner.

(i) (1887), 12 Ap. Cas. 271.

Johnson v. Crédit Lyonnais (1877), 3 C. P. D. 32.

(k) *Fuentes v. Montis* (1868), L. R. 3 C. P. 268; (1869), 4 C. P. 93;

and then have pledged the dock-warrants to a person acting *bonâ fide* as security for an advance. In both of these cases the Court, by narrowly construing the original Factors Act, held, that as it did not appear that the principal intended the agent to get hold of the dock-warrants, and had not intrusted them to the agent, the third party, although he dealt *bonâ fide* with the agent, was not protected by the Factors Acts, and that accordingly the principal was entitled in an action for trover to recover his goods (*l*).

Sect. 2,
sub-s. 4.

“For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.”

Sect. 3.
Pledge of
documents is
pledge of
goods.

“A pledge of the documents of title shall be deemed to be a pledge of the goods.” This extends the effect of the Act, and makes it apply not only to pledgors of goods themselves, but makes the pledging of the documents to have the same effect as a pledge of the goods.

Sect. 4.
Pledge for
antecedent
debt gives no
right as
against owner
of the goods.

“Where a mercantile agent pledges goods as security for a debt or a liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right than could have been enforced by the pledgor at the time of the pledge.”

Where the third party had allowed the debt or liability to be incurred by the agent before the goods or documents of title were pledged, it could not, of course, be said that the principal had so acted as to induce the persons dealing with the agent to believe he was the owner of the goods and thus give him credit. If an agent then pledged goods under such circumstances, it has only the effect of transferring the lien he himself may have in the goods as against the owner (*m*), and the pledging is only good up to that amount as against the owner. Liability means

(*l*) *Hatfield v. Philips* (1845), 14 M. & W. 665; *Phillips v. Huth* (1840), 6 M. & W. 572; *Close v.*

Holmes (1837), 2 Moo. & Rob. 22.

(*m*) See chapter on Rights of Agent against Principal.

something that has not yet developed into a debt, as a claim the amount of which is not ascertained, or a liability on a bill which is still running. The old Act had not this word in it, and consequently the House of Lords, in a case under it, held that the pledge for the amount of a liability which the agent had incurred to the third party was good as against the owner of the goods (*n*).

“The consideration necessary for the validity of a sale, pledge, or other disposition of goods in pursuance of this Act, may be either (1) payment in cash, (2) or the delivery, (3) or transfer of other goods, (4) or a document of title to goods, (5) or of a negotiable security, (6) or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration (a) of the delivery or transfer of other goods, or (b) of a document of title to goods, or (c) a negotiable security; the pledgee shall acquire no right or interest in the goods so pledged *in excess of the value of the goods, documents, or security, when so delivered or transferred in exchange.*”

Sect. 5.

What consideration for disposition of goods good.

This section facilitates loans and overdrafts by bankers and others to mercantile agents, since it allows the substitution of the security of another set of documents to goods, or of goods themselves, for those in their possession. Although the original advance was not made on the security of the substituted documents or goods, yet it will be good to the extent of the value of the goods, &c. on which the original loan was made. It would seem that the onus of proving their value will lie on the person supporting the transaction.

Object of section to facilitate loans by bankers.

“For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale, or pledge on his behalf, shall be deemed to be an agreement with the agent.”

Sect. 6.

Agreement with clerks, &c.

(*n*) *Kaltenbach v. Lewis* (1884), 10 Ap. Cas. 617.

Sect. 7,
sub-s. 1.
Provisions as
to consignors
and con-
signees.

“Where the *owner* of goods has given possession of the goods to another person (a) for the purpose of consignment or sale, (b) or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of *advances* made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods and may transfer any such lien to another person.”

This section protects persons dealing with an agent in two cases, although such agent may not be a “mercantile agent” within the definition clause of the Act: first, where the owner has given the agent possession for the purpose of consignment or sale; and the second, where the owner has shipped the goods in the name of the agent. In both these cases the second party dealing without notice is put in the same position as if the agent were the owner. It does not appear that under this Act the shipment need have been for the purpose of consignment or sale as under the previous Act (o).

Sect. 7,
sub-s. 2.

“Nothing in this section shall limit or affect the validity of any sale, or pledge, or disposition, by a mercantile agent.”

There will, therefore, be any additional protection that may be gained under the foregoing part of the Act if the agent happen to be a mercantile one within the meaning of the Act.

Sect. 8.
Disposition
by seller
remaining in
possession.

“Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or a *mercantile agent acting for him*, of the goods or document of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof to any person *receiving the same* in good faith,

(o) *Johnson v. Crédit Lyonnais* (1877), L. R. 3 C. P. D. 32.

without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same." This section does not, strictly speaking, deal with the law of agency or factors. It protects the least blameworthy of two innocent parties. If a person chooses to buy "goods" and then leaves the documents of title thereto in the seller's hands, he is put in the same position, when any other person lends money on them or buys them in good faith, as if the seller had been authorized to re-sell or pledge them.

"Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, *the delivery or transfer* by that person, or by a mercantile agent acting for him, of the goods or documents of title (a) *under any sale*, pledge, or other disposition thereof, or (b) *under any agreement for sale*, pledge, or other disposition thereof, *to any person receiving the same in good faith*, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Sect. 9.
Disposition
by buyer
obtaining
possession.

This section, also, does not deal with the law of Principal and Agent. It provides for the converse case to that in the last section: namely, where the purchaser and not the vendor acts fraudulently. This section, like the last, is intended to protect a third party dealing *bonâ fide* with a person who is in possession of goods with the consent of the true owner. The third party is not obliged to investigate into the circumstances under which possession has been obtained. The third party is safe in dealing with the person in possession of the goods or documents if the owner has put such person in possession of them, either under an arrangement that the latter is to buy them himself, or for the purpose of their being sold, pledged, or

otherwise disposed of. This section and the last were passed because the other Factors Acts were construed only to apply to cases between principal and agent, and in neither the case of the fraudulent buyer nor seller could they be said to be intrusted with the goods or documents as agents. The purchaser in good faith of goods from the person to whom they have been hired under a hire and purchase agreement is protected under this section (o).

Sect. 10.
Effect of
transfer of
documents on
vendor's lien,
or right of
stoppage *in
transitu*.

“Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect in defeating *any vendor's lien or right of stoppage in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.”

A vendor's lien is a right to retain the goods, &c. until he is paid. Stoppage *in transitu* is a right to retake the goods, &c. by an unpaid seller when he finds the buyer is insolvent, if the latter has not already assigned the goods, &c. to a person for valuable consideration and without notice. The Courts have held that this right of stoppage *in transitu* can only be defeated by an assignment of a bill of lading to a person without notice, and refused to extend it to other documents of title, as shipping notes and delivery orders (p).

The editors of the tenth edition of Smith's Mercantile Law, and Messrs. Neish and Carter, are of opinion that this section is redundant, and only enacts what is already effected by the previous section (y). The section is practically a re-enactment of sect. 5 of the Factors Act, 1877. Up to that time a vendor's lien still subsisted after he had given a delivery order; and therefore

(o) *Lee v. Butler*, (1893) 62 L. J. Q. B. 591; 69 L. T. 379; 9 Times, 631.

(p) *Akerman v. Humphrey* (1823),

1 C. & P. 53.

(y) Smith's Mercantile Law, 10th ed. vol. i. p. 148; Neish and Carter's Factors Act, 44.

an indorsee of a delivery order for value got no better title than the indorser. A person lending money on such a document of title was not protected until he had the goods in his possession: the indorsement of which, therefore, differed in effect from the indorsement of a bill of lading (r). The negotiation of all the documents of title in sub-sect. 1 is made as effective for defeating the vendor's lien as the negotiation of a bill of lading. They have not, however, been made negotiable instruments.

“For the purposes of this Act the transfer of a document may be by *indorsement*, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, *then by delivery*.”

Sect. 11.
Mode of
transferring
documents.

“(1) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.”

Sect. 12.
Saving rights
of true owner.

“(2) Nothing in this Act shall prevent the owner of goods from *recovering the goods* from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof; or shall prevent the owner of goods pledged by an agent from *having the right to redeem* the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged and paying to the agent, if by him required, any money in respect of which the agent would be by law entitled to retain the goods or the documents of title thereto, or any of them, by way of lien, as against the owner; or *from recovering* from any person with whom the goods had been pledged *any balance of money* remaining in his hands, as the produce of the sale of the goods, after deducting the amount of his lien.”

Sect. 12,
sub-s. 2.

This sub-section defines the circumstances under which the principal may either (a) recover the goods themselves from the agent or his trustee in bankruptcy; (b) redeem

(r) Benjamin on Sales, 4th ed. 2 H. L. Cas. 309; *Griffiths v. Perry* p. 827; *McEwan v. Smith* (1849), (1859), 1 E. & E. 680.

them if pledged; or (c) recover the balance of any money representing the goods which remains after satisfying the lien on them. A factor is regarded as a trustee in respect of goods in his hands as factor, and therefore the property in them will not on his bankruptcy pass to the trustee in bankruptcy, but will remain in the principal (s). By the 44th section of the Bankruptcy Act, 1883, property of a bankrupt divisible among his creditors is to comprise "all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business by the consent of the true owner under such circumstances that he is the reputed owner thereof;" and the Act expressly, by an earlier part of the same section, excludes "property held by the bankrupt in trust for any other person." It does not, therefore, seem clear whether goods in the hands of a bankrupt factor belong to the principal or are divisible among creditors. In a case (t) decided by the late Master of the Rolls, Sir George Jessel, under the 15th section of the Act of 1869, which for this purpose is identical with the Act of 1883, the learned judge seems not to have decided in favour of the principal on the ground that the property was held by the factors as trustees, but on the ground that the goods were not in their order, &c. under such circumstances that they were reputed owners thereof, since they described themselves as "merchants' agents." It was argued that the doctrine of reputed ownership did not apply to factors, since they were trustees, but this view does not appear to have commended itself to the Master of the Rolls, if the principal had allowed the agent to hold himself out as owner. See below, however, as to the rights of principal to follow the goods or their produce.

"Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price

Sect. 12,
sub-s. 3.

(s) *Copeman v. Gallant* (1716), 1 P. W. 314; Robson on Bankruptcy, 5th ed. p. 517.

(t) *Ex parte Bright, In re Smith* (1879), 10 C. D. 566.

agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent."

This section simply preserves the rights of the principal against the third party to sue on the contract of the agent, although it may have been unauthorized (*u*).

"The provisions of this Act shall be construed in amplification, and not in derogation, of the powers exercisable by an agent independently of this Act."

Sect. 13.
Savings of
common law
powers of
agent.

The remaining sections 14, 15, 16, and 17 are of no importance, and therefore are not treated here. See Appendix.

In some cases the principal can bring an action against the third party to recover possession of his goods or their produce where the agent himself cannot so do. For at common law and also in equity, the owner of goods has a right to follow them into the hands of any person into which they have come *mala fide*, if he can identify them, unless they have been sold in market overt, or he is estopped by having given the person who has disposed of them apparent authority to deal with them, or by the Factors Act, which, as has been pointed out, protects these parties by logically carrying out the principle of estoppel where the agent is put in the position of dealing as owner (*x*). Thus, it was held where the plaintiff's clerk embezzled and converted the plaintiff's money, and paid it to the defendant for the purpose of some lottery tickets, that the plaintiff could sue for the identical notes and money paid to the defendants (*y*). Lord Ellenborough held, in *Taylor v. Plumer* (*z*), that the principal had a right to follow his property if the agent had abused his authority, notwithstanding any change which that property might have undergone, so long as it was capable of being identified

Principal
right of
following his
property,
and may sue
for proceeds
on conversion.

(*u*) *George v. Claggett* (1796), 7 T. R. 359.

(*x*) *Cole v. London & N. W. Bank* (1875), 10 C. P. 354; see *Blackburn, J.*, at p. 362; and see *Kalten-*

bach v. Lewis (1885), 10 Ap. Cas. 617.

(*y*) *Clarke v. Shee* (1774), Cowp. 197, at p. 200.

(*z*) (1815), 3 M. & S. 562.

Rule when
agent becomes
bankrupt.

and distinguished from all other property. "An abuse of trust can confer no right on the party abusing it, nor on those who claim in priority with him. The argument that the property of the principal continued only so long as the authority of the principal was presumed in respect to the order and disposition of it, and that it ceased when the property was tortiously converted into another form for the use of the agent himself, was a mischievous argument in principle, and supported by no authorities in law." Lord Ellenborough pointed out that the difficulty which arose as to following it when it was turned into money was only a difficulty of fact, and not of law, *i. e.*, the difficulty of distinguishing the actual money. The principal is entitled to recover property he has entrusted to a factor from the assignees of the factor, in the event of such factor becoming bankrupt, just as if it was recoverable from the factor himself. Such property does not vest in the assignee. Mr. Yate-Lee (*a*) points out, however, that the fact that the business of the agent was an agency business must be notorious; for the 44th section of the Bankruptcy Act, 1883, makes all property divisible among the creditors of the bankrupt which is "at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof." It was held that where the agent had on his door "Manufacturers' Agent," the goods did not vest in the trustees in bankruptcy of the agent, for the agent had never held himself out as the owner of the goods at all, and they were not in the possession of the bankrupt under circumstances that he was the reputed owner thereof (*b*). But where the agent had been originally in business for himself, and changed the nature of his business into an agency without the outside world knowing anything of the

(*a*) Yate-Lee on Bankruptcy.

(*b*) *Ex parte Bright, In re Smith* (1879), 10 C. D. 566.

change, the goods were held to be divisible among the creditors; for, under the circumstances, his possession was that of a reputed owner (*c*).

If the owner of goods has been induced to part with them by fraud, he has a right to follow them or their produce wherever he can find them, unless they have been sold in market overt. Every person dealing with them in a way that he could not justify if he were the finder is liable to the principal for conversion. Thus, where an agent had been induced by a fraudulent representation to part with cotton to a person who sold it to a firm of commission agents, and these agents resold the cotton to a firm of cotton spinners, the House of Lords held that the owner was entitled to follow his goods or their produce into the hands of the commission agents, and they were liable to him for a conversion, because they had dealt with the property in a way they could not justify if they were finders of it, that the commission agents were also liable for a conversion, and therefore for the value of the goods to the owner of the goods (*d*).

Where fraud,
no title can
be obtained to
goods.

A factor is a person in a fiduciary position, and it has been held, as regards property disposed of by persons in such a position, that the owner can, if the sale is rightful, take the proceeds of the sale if he can identify them. If the sale is wrongful, he can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds if they can be identified. There is no distinction, therefore, between a rightful and wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds (*e*). In another case (*f*), a stockbroker sold his client's securities, and paid

Factor
fiduciary
agent.

(*c*) *Re Fawcus, Ex parte Buck* (1876), 3 C. D. 795.

(*d*) *Hollins v. Fowler* (1874), L. R. 7 H. of L. 757.

(*e*) *Knatchbull v. Hallett* (1879), 13 C. D. 696, at p. 706, *per* Jessel, M.R.

(*f*) *Ex parte Cooke, In re Strachan* (1876), 4 C. D. 123.

the proceeds into his bank. It was clear that the balance in the bank was the proceeds of the sale of the principal's securities, and the Court made an order that such part of the balance as arose from the proceeds should be paid to the principal, following the decision in *Taylor v. Plumer* (g). The right of an owner to follow his goods or their produce does not depend on priority of contract, as was pointed out in *Kaltenbach v. Lewis* (h). In a number of cases, as we have seen, the Factors Act gives, for the convenience of business, the agent with which it deals large powers (not given by the principal) for the purpose of protecting third parties dealing with him on the faith of his apparent ownership. Where the Act applies it prevents an owner following his goods or their proceeds, and his only remedy is against his agent if his instructions have been violated. Where the Act does not apply, or the third party does not come within its protection by having notice that he is dealing with an agent who is exceeding his authority, the owner may follow his goods.

Principal can only follow his own money, not that obtained by agent by fraud from third parties.

Test whether money can be followed.

If the money sought to be recovered from the agent is money which he has obtained by a breach of duty or fraud from third parties, the principal has only a right to make him account for it as a debt due to him; but he has no right to follow it into the hands of third parties; that is a right which he only has if he is seeking to recover money or property which was his own before the wrongful act. In the first case he can only have an account or sue for money had and received to his use—the true test as to the right to follow being thus the case of a principal seeking to recover money which was his own before any act was wrongfully done by the agent (i).

Principal's right of action

Where an agent has by mistake paid money to a third

(g) (1815), 3 M. & S. 562.

(h) See *Kaltenbach v. Lewis* (1885), 10 Ap. Cas. 617.

(i) *Lister v. Stubbs* (1890), 45 C. D. 1; *Metropolitan Bank v. Heiron* (1880), 5 Ex. Div. 319.

party, the principal has a right to bring an action to recover it. For where a man pays money by his agent which ought not to have been paid, either the agent or the principal may bring an action to recover it back. The agent may from the authority of the principal, and the principal may as proving it to have been paid by his agent. Thus, where the master of a ship had paid excessive dues to a custom-house officer, Lord Mansfield held that the shipowner could bring an action to recover the excess (*k*).

against third party for money paid by mistake.

If a third party persuade the agent to leave the principal's service for the indirect purpose of injuring him or of benefiting himself at the expense of the principal, it is a malicious act, which is in law and in fact a wrong, and therefore a wrongful act, and therefore an actionable act if injury ensues from it (*l*). There the defendant induced an agent who, it was held, was not a servant, to desert the plaintiff's service, so that he might have the benefit of his knowledge and experience in making bricks. Similarly, if he slander the principal's agent so as to cause damage to his business (*m*). Generally, it is clearly actionable to conspire maliciously to prevent persons from contracting with a particular individual if damage is proved (*n*); and this applies to all contracts, whether for personal service or not, and also to inducing persons not to enter into future contracts (*o*).

Principal can sue third party for enticing away his agent.

Lord Justice James laid down the law thus as to a third party's tampering with the agent: "According to my view of the law of this Court any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this Court.

Principal has action against third party for corrupting agent.

(*k*) *Stevenson v. Mortimer* (1778), Cowper, 805.

Div. 91.

(*l*) *Bowen v. Hall* (1881), 6 Q. B. D. 333, at p. 338.

(*n*) *Mogul Steamship Co. v. McGregor*, (1892) Ap. Cas. 25.

(*m*) *Riding v. Smith* (1876), 1 Ex.

(*o*) *Temperton v. Russell*, (1893) 1 Q. B. 715.

That I take to be a clear proposition, and state it according to my view to be equally clear that the defrauded principal, if he comes in time, is entitled at his option to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right" (*p*).

The principal may recover from the agent the amount of the bribe which he has received (*q*), and he may recover damages against the third party for the conspiracy (*r*).

Remedies of principal where agent has been bribed.

If the principal chooses to affirm the contract where the third party has succeeded, by bribing the agent, in getting him to enter into a disadvantageous bargain, he has the two distinct and cumulative remedies. He may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third party first. "The agent has been guilty of two distinct and independent frauds; the one in his character of agent, the other by reason of his conspiracy with the third person with whom he has been dealing. Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe he had received" (*s*).

(*p*) *Panama, &c. Telegraph Co. v. India Rubber, &c. Works Co.* (1875), 10 Ch. Ap. 515; see also *Lister v. Stubbs* (1890), 45 C. D. 1; *Smith v. Sorby* (1875), 3 Q. B. D. 552, n.

(*q*) See *Mayor of Salford v. Lever*, *ubi supra*, per Lord Esher, p. 169.

(*r*) See also *Harrington v. Victoria Graving Dock* (1878), 3 Q. B. D. 549.

(*s*) Per Lord Esher in *Mayor of Salford v. Lever*, (1891) 1 Q. B. 168.

There is a settled rule that if there are two joint tortfeasors, and the person to whom the wrong has been done releases one of the two, he cannot afterwards sue the other. Therefore, if the principal absolutely released the agent he has no remedy against the third party, but it must be an absolute release, and not merely an agreement to suspend action against him (*t*).

(*t*) *Mayor of Salford v. Hunter, ubi supra.*

CHAPTER XV.

THE LIABILITY OF THE PRINCIPAL TO THIRD PARTIES.

Principal
liable by
contract to
third party.

WE have now to consider under what circumstances the principal becomes liable to third parties. He may be, first, liable by contract to the third party. If he authorizes an agent to make a contract on his behalf, and the agent acts within the authority, he is liable on it, and the contract in law is considered as made by him personally, and it is equally so if the contract, though originally without authority, is ratified by him. The doctrine rests upon this principle—that the act of the agent was the act of the principal, and the subscription of the agent was the subscription of the principal. And he is liable for any frauds or misrepresentations of his agent when making it (*a*). But it has been held in the case of the sale of real property, that if the agent innocently makes a misrepresentation, which has induced the third party to give more than he would otherwise have given outside his authority, the principal is not bound to compensate the third party for it after the conveyance has been executed (*b*).

It has been held that if the principal authorizes an agent to receive money for him, the agent's receipt of the money is the same as if he had himself received it (*c*). Agents who are authorized to sell goods have an implied authority to receive payment for them (*d*).

(*a*) See Liability of Third Parties to Agent, p. 308.

(*b*) *Brett v. Clowser* (1880), 5 C. P. D. 376.

(*c*) *Mathews v. Haydon* (1796), 2 Esp. 510.

(*d*) *Capel v. Thornton* (1828), 3 C. & P. 352.

The principal is also liable to the third party where he has held out a person as his agent and that agent does something which is within the apparent scope of his authority. And this is so although the agent has been privately instructed not to do a certain thing. Thus, where an agent had general authority to arrange terms on which land should be exchanged, and the principal instructed him only to exchange wood for wood, the principal was held bound to the contract, although the agent neglected these instructions. Lord Cottenham said (*e*), in giving judgment, "Did not the paper signed by the Duke (the principal), hold out to all who might associate with Mr. Wedge (the agent), or the commissioner, reason to believe that the Duke was willing to take any land that might be agreed upon in exchange for Dunley Gorse? Having given them general authority, can he be heard to say that the authority was limited by private instructions, of which those who dealt with the agent knew nothing?"

Liab. on principle of holding out to the extent of agent's apparent authority.

In *Whitehead v. Tuckett* (*f*), where a principal had given his brokers special instructions as to how and to whom to sell goods, Lord Ellenborough said, referring to the terms of the private instructions given to the agents, "If these expressions are to be construed into so many restrictions of the power of the brokers, it will follow that they were not only limited as to price, but also as to the terms of sale, which, according to the latter, were to be 'the best': and as to the purchasers, who were to be 'safe men,' and if in either of these respects the contract made by them should fail, their principal would have a right to reject it. But if this could be done, in what a perilous predicament would the world stand in respect of dealings with persons who have secret communications with their principal! Such communications must not be taken as limitations of their

Broker's authority.

(*e*) *Duke of Beaufort v. Neeld* (1845), 12 Cl. & Fin. 248, at p. 290. (*f*) (1812), 15 East, 400; see also *Precious v. Able* (1794), 1 Esp. 350.

power, however wise they may be as suggestions on the part of the principal."

Principle applies also to cases where strictly no holding out as agent.

The principal may also be liable to third parties for an agent's acts although he has not held him out as his agent, and as having authority. Thus, where the principal puts an agent in such a position over his property that he appears to the world as owner, he is liable for his acts, although strictly there has been no "holding out," since the principal was unknown. For the principal will not only be liable for the acts of his agent, within his apparent authority where he has held him out as an agent; but he is also liable where he has put another in such a position that the world would be led to believe from the fact that a man occupied such a position that he must have power to act, whether in fact he was an agent or not. Thus, where a principal put an agent called Bushell into a business, as his manager, and directed him to carry it on as Bushell & Co., it was held he thereby held him out as owner. And although the principal had given the agent no authority to draw or accept bills, still he was liable on bills drawn by Bushell for the purposes of the business; for the agent must be taken to have had authority to do whatever was necessary or incidental to carrying on the business, and drawing and accepting bills was incidental to it. The agent could not be divested of the apparent authority as against third persons by a secret authority (*g*).

Tenant of public-house.

In *Watteau v. Fenwick* (*h*), a firm of brewers put in an agent as manager of a tied house belonging to them, and only gave him authority to buy bottled ales and mineral waters. The house had originally belonged to the agent, but he had sold it to the principals, the brewers, some years before the action was brought. The plaintiffs, the third parties, gave credit to the agent only, but on finding out the

(*g*) *Edmunds v. Bushell* (1865), L. R. 1 Q. B. 97. (*h*) (1893) 1 Q. B. 346.

brewers owned the house, brought an action against them for the price of goods which the manager had ordered in contravention of his authority. Mr. Justice Wills, in a judgment in which the Chief Justice, Lord Coleridge, concurred, held the brewers liable, and said, "The principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is so only where there has been a holding out of authority, which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal; but I do not think so. Otherwise, in every case of an undisclosed principal, or, at least, in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal. But in the case of a dormant partner, it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion." This, it is submitted, is the true principle, where the principal either goes to an agent who has *primâ facie* certain powers as a factor or auctioneer, or where he puts the agent into a position to which certain powers naturally belong.

Principal
liable
although
third party
did not know
of existence.

Sleeping
partner.

Again, if the principal stands by and allows a person to assume ownership of his property, he will not be able to recover it from a third party, to whom it has been sold (*i*). In *Picard v. Sears* the plaintiff, who had a mortgage on the property, allowed it to be sold by an execution creditor of

Where
principal
allows third
party to
assume
ownership.

(i) *Picard v. Sears* (1837), 6 Ad. & El. 469; see Liability of Third Party to Principal.

the mortgagors to the defendant without making any claim on the property. After the sale he brought an action for trover against the defendant. Lord Denman said: "The rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act in that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time, and the plaintiff in this case might have parted with his interest in the property by verbal gift or sale without any of those formalities which throw technical obstacles in the way of legal evidence. And we think his conduct, in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature that the opinion of the jury ought, in conformity with *Heane v. Rogers* (*k*) and *Graves v. Key* (*l*), to have been taken whether he had not in point of fact ceased to be owner." Similarly, the rights of third persons will be protected where they have dealt with an agent supposing him to be a principal (*m*).

Where
exclusive
credit given
to agent
principal not
liable.

If a third person has entered into a contract with another, who is in fact an agent, although he has never heard of the principal, yet he can sue him on the contract, unless, after hearing of the fact of there being a principal, he has elected to give exclusive credit to the agent. "A seller who knows who the principal is, and, instead of debiting that principal, debits the agent, is considered, according to the authorities which have been referred to [*Paterson v. Gandasequi* (*n*), *Addison v. Gandasequi* (*o*), *Maanss v. Henderson* (*p*)], as consenting to look to the agent only, and is thereby precluded from looking to the principal" (*q*). But the mere fact that the third party has, after knowing there was a

(*k*) (1829), 9 B. & C. 586.

(*l*) (1832), 3 B. & Ad. note a.

(*m*) See Liability of Third Party to Principal.

(*n*) (1812), 15 East, 62.

(*o*) (1812), 4 Taunt. 574.

(*p*) (1801), 1 East, 335.

(*q*) *Per* Bailey, J., in *Thomson v. Davenport* (1829), 9 B. & C. 78, p. 89.

principal, insisted upon the agent's name being put down in the contract does not relieve the principal from liability (s).

Where the agent makes a contract in his own name, the third party can elect whom he will sue. What constitutes election is a matter of fact to be decided by a jury. The demand of payment is an equivocal act if it is made from the agent, as it may have been made upon him on behalf of the principal (s). "The very expression, that where a contract is so made, the contractee has an election to sue the agent or principal, supposes he can only sue one of them, that is to say, to judgment. For it may well be that an action against one might be discontinued and fresh proceedings be taken against the other" (t). And Lord Tenterden, in *Thomson v. Davenport* (u), said: "If at the time the seller knew not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal is, and, notwithstanding that knowledge, chooses to make the agent his debtor, then, according to *Addison v. Gandasequi* and *Paterson v. Gandasequi*, the seller cannot afterwards, on failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between one and the other."

Third party can elect whom to sue, whether the principal or agent. Cannot sue both.

In *Kendall v. Hamilton* (v), Lord Cairns said: "Now I take it to be clear that where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent or he may sue the principal: but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of *Priestley v.*

(s) *Calder v. Dobell* (1871), L. R. 6 C. P. 486.

(t) *Per* Lord Bramwell in *Priestley v. Fernie* (1865), 3 H. & C. 977; 34

L. J. Ex. 173.

(u) (1829), 9 B. & C. 78.

(v) 1879), 4 App. Cas. 504.

Fernie (x) may be mentioned. But the reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent should be driven to sue the principal if he does not wish to sue him; and, on the other hand, it would be equally contrary to justice that the creditor, on discovering the principal who really has had the benefit of the loan, should be prevented from suing him if he wished to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal when there was no contract, and when it never was the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he (the agent) would have a right of action for indemnity against his principal, while, if the principal were liable also to be sued, he would be vexed with a double action." The House of Lords therefore held that judgment, even without satisfaction, against either principal or agent, was a bar to an action against the other party.

Principal not
liable if
settled
accounts with
agent.

This rule is subject, however, to a qualification, which was thus stated by Mr. Justice Bayley in *Thomson v. Davenport* (y). "The principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call in his principal, the fact of payment or such state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent.

This statement of the exception was objected to as too wide by Baron Parke, who, in *Heald v. Kenworthy* (z), held

(x) (1865), 3 H. & C. 977.

(y) *Ubi supra*; see also *Smyth v.*

Anderson (1849), 7 C. B. 21.

(z) (1855), 10 Ex. 739.

that if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment unless the agent pays it accordingly.

In *Armstrong v. Stokes* (a), a distinction was drawn between such agents as would be naturally expected by the third party or seller to have principals, in dealing with whom he would know that he had another person liable to him beyond the agent, though he did not know who that other person was, and the class of agents as to whom the seller or third party would consider it a "godsend," in Mr. Justice Blackburn's words, if he found on their failure or insolvency that there was a principal behind who was also liable. For instance, in every case where the sale is to a broker, the vendor knows that there is or ought to be a principal between whom and himself there is established privity of contract, and whose security he has in addition to that of the broker; and the principal also knows that the vendor is aware of this, and to some extent trusts to his liability. Where, however, the agent is a commission merchant, or a merchant dealing on his own account, the seller or third party may think that he is dealing with a principal. As to the latter class of agent, it was decided that a seller who has given credit to an agent, *believing him to be a principal*, cannot have recourse against the undisclosed principal if the principal has *bonâ fide* paid the agent at a time when the seller still gave credit to the agent and knew of no one else (b).

True rule as to liability of principal who has settled accounts with agent.

It has been questioned in *Irvine v. Watson* whether the distinction should turn on the seller's belief as to whether he was dealing with a principal or on the nature of the agent's business, from which the principal would be justified in inferring that the third party or seller relied on the agent alone, and it is submitted the latter is the true test. Lord

Lord Bramwell's view as to the principal.

(a) (1872), L. R. 7 Q. B. 598.

(b) See Bowen, J., in *Irvine v. Watson* (1879), 5 Q. B. D. 102.

L. J. Brett.

Justice Bramwell (*c*) said, he did not understand how the mere fact of the vendor (the third party) knowing or not knowing that the agent has a principal behind him could affect the liability of that principal, and thought the liability would depend upon what the principal himself knew, that is to say, whether he knew that the vendor or third party had a claim against him and would look to him for payment in the agent's default; and Lord Justice Brett thought it depended, first, on the fact that the seller dealt with the agent as sole principal, and that, secondly, the nature of the agent's business was such that the principal ought to have believed that the third party would so deal with him; for in such a case it would be unjust to allow the seller to recover from the principal after he had paid the agent; the principle being, that where exclusive credit was given by the third party or seller to the agent, the principal, by paying the agent, relieves himself of all responsibility to the third party.

Let us take first the case where the agent belongs to the first class of agents, where the third party knows there is a principal, as for instance, brokers; there the third party knows that there is a principal from the nature of the broker's employment, and the form of the contract in the bought and sold notes, though he may not know who the principal is. It has been decided in such a case that the principal is not discharged by payment to the agent, unless the third party has done something which would make it inequitable that he should be asked to pay over again to the third party. This must be something arising out of the conduct of the third party which induced the principal to believe that a settlement had already been made with the agent. Sir George Jessel stated the principle as follows (*d*): "All the judges are agreed in laying down that where the seller knows that there is a

(*c*) *Irvine v. Watson* (1879), 5 Q. B. D. 414.

(*d*) *Davison v. Donaldson* (1882), 9 Q. B. D. 623, at p. 628.

principal behind the person with whom he is dealing, he must be shown to have done something which raises an equity against him, otherwise the principal is not discharged."

The question then arises, what conduct on the part of the third party will be sufficient to raise this equity against him? Will delay in obtaining payment from the agent or applying to the principal estop the third party claiming against the principal? In *Irvine v. Watson* (c) Mr. Justice Bowen thought the delay, in order to work an estoppel, must be such as reasonably led the principal to infer that the seller no longer requires to look to the principal's credit, such a delay, for example, as leads to the inference that the debt is paid by the agent, or to the inference that though the debt is not paid, the seller elects to abandon his recourse to the principal and looks to the agent alone (f). In *Davison v. Donaldson*, he says: "I do not say that in very special circumstances mere delay may not amount to misrepresentation; it may be conduct misleading the defendant (the principal). But that can only be when there is something in the original contract, or in the conduct of the parties, which renders the delay misleading." In *Irvine v. Watson* (g), Lord Justice Bramwell suggests a case where from something in the contract delay would be misleading—i. e., where there was an invariable custom in a trade to insist upon prepayment; in such a case, non-insistence on prepayment might discharge the buyer (the principal) if he paid the broker on the faith of the seller having already paid; and Sir George Jessel said (h), "I am far from saying that there may not be special cases in which mere delay on the part of the plaintiff would be held to be sufficiently misleading conduct; it may amount

Whether third party's delay in claiming against principal works an estoppel.

(c) (1879), 5 Q. B. D. 102, at p. 107.

(f) (1882), 9 Q. B. D. 623, at p. 631.

(g) (1879), 5 Q. B. D. 414, at p. 416.

(h) *Davison v. Donaldson* (1882), 9 Q. B. D. 623.

to a representation that he has been paid." The case of *Smethurst v. Mitchell* (i) is an authority that where goods are not to be delivered till the account is paid, and yet the goods are delivered, whether the seller takes a bill of exchange or not, the seller cannot afterwards come upon the principal.

In *Irvine v. Watson* (k) the seller sold the goods on the terms cash on or before delivery, but there was no invariable custom not to deliver without cash. The defendants (the principals) paid the agent, but he became bankrupt, and did not pay the third party. The agent informed the seller that he was buying for principals, but not who they were. Under these circumstances the Court held that the fact of the principal having paid the broker did not preclude the seller recovering the price. In *Davison v. Donaldson* goods were supplied to the managing owner of a ship in the summer of 1877. The seller did not apply to the principals for payment until February, 1881. The principal settled accounts with his agent in December, 1877, but was not induced to settle this account owing to the seller's delay. The Court held that the seller was entitled to be paid by the principals on the ground that there was no misleading conduct. In this case, the principals were co-owners of the ship, and the late Master of the Rolls said partners ought not to settle with their co-partners without satisfying themselves that the payments have been actually made; and on this ground Lord Justice Lindley held the plaintiff was in a better position than he would have been if he had only the option of suing the agent, or the undisclosed principal, as he could for that reason sue them jointly.

Where
principal is a
foreign
principal,
prima facie
not liable on

When the principal, however, is a foreign principal, he gives the commission agent, as a rule, no authority to pledge his credit or to establish privity of contract between him and the third party. In this case it seems the agent

(i) (1859), 28 L. J. Q. B. 241.

(k) *Ubi supra*.

is not a true agent, but is really to a certain extent a principal, since he does not establish privity of contract between the principal and a third party. The owner's of the goods only right is to sue the agent for their price less the commission. It was originally only a question of fact whether there was privity of contract; but Lord Blackburn says the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of an order to a London commission merchant is so obvious and well known that one is justified in treating it as a matter of law, and saying that, in the absence of evidence of express authority to that effect, the commission agent cannot pledge his foreign constituent's credit (*l*). In such a case, therefore, the third party cannot sue the principal at all, as there is no contract with him. We have seen that, in the case of an agent who has a foreign principal, it is altogether a question of fact whether he has made himself liable on the contract he makes for a foreign principal when he contracts as agent (see "Liability of Agent to Third Parties"). Unless the agent warranted his authority to establish privity of contract, if he merely bought on behalf of the foreign principal as agent, it seems neither the foreign principal nor yet the agent could be made liable.

When the principal is not a foreign principal, and the contract is made by an agent other than a broker, Lord Blackburn thinks that *primâ facie* authority is given to establish privity of contract. But if the contract is so made that the third party does not know that the agent is not a principal, but takes him for the principal, supposing at the time he was dealing with a principal, then, as we

agent's contract.

Primâ facie agent's authority to establish privity of contract so that third party can sue.

(*l*) See also Lord Blackburn's judgment in *Elbinger Actien Gesellschaft v. Claye* (1873), L. R. 8 Q. B. 313, at p. 317; and Wright, J., in *Montgomerie v. United Kingdom Mutual SS. Assoc.*, (1891) 1 Q. B. 370, at p. 372; *Hutton v. Bullock* (1873), L. R. 8 Q. B. 331.

Principal may
from form of
contract not
be liable.
Deed.

have seen (*m*), if the principal has settled accounts and paid the agent, the third party cannot recover against him (*n*).

The principal may, from the form of the contract made by the agent, not be liable to the third party. Thus, where the contract is by deed, and he is not a party to it, under the common law he could not be made liable, as no one could be sued on a deed except a party thereto (*o*). But the 46th section of the Conveyancing Act, 1881, now allows the donee of a power of attorney to sign his own name and execute a deed in his own name, and makes it equally effective, so that in cases where there is a power of attorney it would seem that even if not a party to the deed the principal could be sued on it.

Bill of ex-
change, &c.

In *Beckham v. Drake* (*p*), Baron Parke says that bills of exchange and promissory notes are an exception to the general rule that the principal is liable on the contract of the agent. "The case of bills of exchange is an exception which stands upon the law merchant, and promissory notes another, for they are placed upon the same footing by the statute of Anne. In neither of these can any but the parties named in the instrument by their name or firm be made liable to an action upon it." This is also the rule stated by the Editors of Byles on Bills (*q*); and Mr. Justice Wright, in *Montgomerie v. United Kingdom Steamship Association* (*r*), mentions it also as a case where the principal is not liable. He says: "If a person who is an agent makes himself a party in writing to a bill or note a principal cannot be added." In *Edmunds v. Bushell* (*s*), the principal was held liable on a bill signed Bushell & Co., on the ground that the agent Bushell had authority

(*m*) Page 264.

(*n*) *Armstrong v. Stokes* (1872), 7 Q. B. 598, at p. 610.

(*o*) *Beckham v. Drake* (1841), 9 M. & W. 79; *In re International Contract Co., Pickering's claim* (1871), 6 Ch. 525. As to the old law as to charter-parties by deed, see Ab-

bott's Merchant Shipping, 13th ed. pp. 220—223.

(*p*) (1841), 9 M. & W. 79.

(*q*) 15th ed. p. 44.

(*r*) (1891) 1 Q. B. 370; see also *Leadbetter v. Farrow* (1816), 5 M. & S. 345.

(*s*) (1805), L. R. 1 Q. B. 97.

to sign it this way when carrying on as manager the business belonging to the plaintiff, which was known as "Bushell & Co."

By sect. 23 of the Bills of Exchange Act, 1881 (*t*), no person is liable as drawer, indorser or acceptor of a bill who has not signed it as such; provided that (1) where a person signs a bill in a trade or assumed name he is liable thereon as if he had signed it in his own name. (2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

Bills of Exchange Act.

Again, the principal is not liable to the third party if the agent and he so contract as only to look to one another, and to exclude the right of the principal to sue the third party or the third party's right to sue the principal; for the right to sue and be sued is reciprocal.

If third party agrees only to sue agent, cannot sue principal.

This was the case in two mutual insurance cases (*u*), where steamship owners formed themselves into a club to mutually insure their ships, and, by one of the articles of association, provided that all claims in respect of insurance or protection shall be made and enforced against the association only, and not against any member thereof, but the association shall not be liable to any member or other person for the amount of any loss, claim or demand, except to the extent of the funds which the association is able to recover from members liable for the same, and which are applicable to that purpose. The agent, who was a member of the club, became bankrupt, and the association then sued the principal for the amount of a contribution due by him in respect of the ship of the principal's he had insured. Lord Esher said, in giving judgment: "As regards any action against a person alleged to be an undisclosed principal of a member by other members, it would be impossible to

Insurance clubs.

(*t*) 45 & 46 Vict. c. 61.

(*u*) *United Kingdom Mutual Steamship Ass. Assoc. v. Nevill* (1887), 19

Q. B. D. 110; *Montgomerie v. United Kingdom Steamship Ass. Assoc.*, (1891) 1 Q. B. 370.

allege that a person is an undisclosed principal in respect of the contract unless the parties who allege that he is a party to the contract as undisclosed principal could be sued by him as well as he by them. I do not think that he is a party to the contract as an undisclosed principal, although he may be a *cestui que trust* in respect of the proceeds the member may receive. Not being a party, he cannot sue or be sued on the contract."

Principal
liable for acts
of agent where
authorized.

The principal may also become liable to a third party through the act of his agent. Thus, if his agent receives money for him, he is liable to the third party for it. Lord Kenyon said, where a person authorizes another to receive money for him, payment to the party so authorized is payment to the principal; and if this was the money of a third party, it is sufficient to charge him with the receipt (*x*). In the same way, the receipt of goods by the agent is a delivery to the master (*y*).

Principal
liable if orders
agent to do
unlawful act.

The principal is in every case liable where he commands an agent to do something which is unlawful, and he cannot raise the defence that the act was done by an independent contractor. So, where a principal employed a contractor to do what was a nuisance, and which he had no right to do—breaking up a road—he was held liable; Lord Campbell saying it would be monstrous if the party causing another to do a thing were exempted from liability for that act merely because there was a contract between him and the person immediately causing the act to be done (*z*). So it was held, in *Barker v. Norwood*, that the principal who had procured a false imprisonment was personally liable (*a*), and that a trespasser may be not only he who does the act, but who commands it or procures it to be done, who aids or assists in it, or who assists afterwards.

(*x*) *Mathews v. Haydon* (1796), 2 Esp. 509; see also *Cary v. Webster* (1721), 1 Strange, 480.

(*y*) *Staples v. Alden* (1678), 2 Mod. 509; *Taylor v.* — (1702),

2 Lord Raymond, 792.

(*z*) *Ellis v. Sheffield Gas Co.* (1853), 2 El. & B. 767.

(*a*) (1772), 2 W. Bl. 865; see also *Bates v. Pilling* (1826), 6 B. & C. 38.

The principal is liable to third parties for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved (*b*); but although he is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency (*c*). If the wrong to the third party does not arise out of any contract, and the relation of master and servant does not exist between the principal and the agent, then (as Mr. Green, the learned editor of the eighth edition of Story on Agency, points out, in a note to section 451) the principal is only liable for the torts of the agent which arise out of the subject-matter of the agency: such as when the subject-matter of the agency involves a tort, as a trespass, or an illegal act, or the agent commits a fraud for the purpose of carrying it out. The principal is liable for torts which arise out of the manner in which the agency is transacted only when the additional relation of master and servant exists between him and his agent (*d*).

Principal
liable also for
fraud of
servant in
course of
employment.

The fraud must have been done for the benefit of the principal. Thus, where the managing director of a company fraudulently obtained payment of a sum of money to himself, it was held that the company was not liable, for the fraud was perpetrated by the managing director for his own benefit, and not in the course of his employment (*e*); and so, too, in another case (*f*), where it was sought to make a company liable for fraudulent misrepresentations made by

But fraud
must have
been for
principal's
benefit.

(*b*) Story, § 452.

(*c*) Story, § 456.

(*d*) Story on Agency, 8th ed. sec. 451, note; *Cuthbertson v. Parsons* (1852), 12 C. B. 304; *Ellis v. Sheffield Gas Consumers' Co.* (1853), 2 El. & Bl. 767; and see p. 277 of

this work.

(*e*) *M'Gowan v. Dyer* (1873), L. R. 8 Q. B. 141.

(*f*) *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714.

their secretary, who had fraudulently, for his own purposes, first issued debentures in excess of the amount the company were authorized to issue, and then given fraudulent answers to the plaintiffs, who inquired of him whether the debentures were good, Lord Justice Bowen said: "It was argued on behalf of the plaintiffs in the present appeal that the defendant company, although they might not have authorized the fraudulent answer given by the secretary, had nevertheless authorized the secretary to do 'that class of acts' of which the fraudulent answer, it was said, was one. This is a misapplication to a wholly different case of an expression which, in *Barwick v. English Joint Stock Bank* (g), was perfectly appropriate with regard to the circumstances there. In that case the act done, though not expressly authorized, was done for the master's benefit. With respect to acts of that description, it was doubtless correct to say that the agent was placed there to do acts of 'that class.' Transferred to a case like the present, the expression that the secretary was placed in his office to do acts of 'that class' begs the very question at issue, for the defendant's proposition is, on the contrary, that an act done, not for the master's benefit, but for the servant's own private ends, is not an act of that class which the secretary either was or could possibly be authorized to do. It is said that the secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation unless the maker of it or the principal has either contracted that the representation is true or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted, for any such contract would have been outside their corporate powers. And if they cannot so contract, how can they be estopped

from denying that they had done so? The action against them, therefore, to be maintainable at all, must be an action founded on deceit and fraud. But how can a company be made liable for a fraudulent answer given by their officer, for his own private ends, by which they could not have been bound if they had actually authorized him to make it (because the debentures were in excess of the amount the company were authorized to issue, and therefore any contract as to them would have been *ultra vires*), and promised to be bound by it? The question resolves itself, accordingly, into a dilemma. The fraudulent answer must either have been within the scope of the agent's employment or outside it. It would not be within it, for the company had no power to bind themselves to the consequences of any such answer. If it is not within it, on what grounds can the company be made responsible for an agent's act done beyond the scope of his employment, and from which they derived no benefit." It was argued that the answering such question was within the scope of his employment, as he had a duty to answer them about transfers generally; but the Court held that the argument was fallacious, for the reasons above given.

Where, however, a fraud is perpetrated by the agent for the benefit of his principal, in the scope of his employment, the principal is liable. In *Barwick v. The English Joint Stock Bank (h)*, the manager of a bank, in order to induce a third party to supply goods to a customer (which were required for the purpose of fulfilling a contract), promised that the goods should be paid for out of the money coming from the contract in priority to any other payment "except to the bank." The manager knew that such a guarantee was fallacious, as the customer owed the bank 12,000*l.*, and the money payable under the contract was only 2,676*l.*

Principal
liable where
agent per-
petrates fraud
for principal's
benefit.

The Court held the bank liable, as the fraud was perpetrated in order to benefit it, for by the contract being carried out it would obtain payment of the 2,676*l*. In holding the bank liable for the fraud, Mr. Justice Willes said: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master can be proved."

When principal a corporation, similarly liable.

This statement of the law was cited with approval by Lord Selborne in *Houldsworth v. City of Glasgow Bank* (*h*); and there, speaking of the liability of corporations for fraudulent agents, he quotes Lord Cranworth in *Addie's case* (*i*), who says, "An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited by those frauds, but that they cannot be sued as wrongdoers personally by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally."

Shareholder cannot sue company for fraud.

It was held in *Houldsworth v. City of Glasgow Bank*, that a person who took shares in a company by a fraudulent representation cannot, on finding out the fraud, elect to keep the shares, to rescind the contract, and get damages for the misrepresentation; his only remedy is to have the

(*h*) (1880), 5 Ap. Cas. 317.

(*i*) (1867), L. R. 1 H. L. Sc. 145.

contract rescinded, and to recover any money he has paid or damages he has sustained; but while he is a member of the company he can bring no action of damages against it in respect of the shares, and after the company was wound up he cannot rescind.

In the case of a chattel, if the agent has deceived the third party, the person so deceived may, on finding out the fraud, retain the chattel and bring an action for any damage he has suffered, or can insist upon being restored to his original position (*k*).

The liability of principal for the acts, negligence, misfeasances, &c. of an agent is confined to those cases where the agent is a servant. This is very clearly put by Sir Frederick Pollock, in his work on Torts (*l*): “The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to a workman the end of the work, but directs the means also, or, as it has been put, ‘retains the power of controlling the work,’ and he who does work on those terms is, in law, a servant, for whose acts, neglects, and defaults to the extent to be specified, the master is liable. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his discretion in things not specified beforehand. In the acts or omissions of such a one about the performance of his undertaking, his employer is not liable to strangers, no more than the buyer of goods is liable to a person who may be injured by the careless handling of them by the seller or his men in the course of delivery. If the contract, for example, is to build a wall—and the builder has a right to say to the employer ‘I will agree to do it, but I shall do it after my

Principal only
liable for
agent's negli-
gence when
agent a
servant.

(*k*) *Houldsworth v. City of Glasgow Bank* (1880), *ubi supra*.

(*l*) Pollock on Torts, 3rd ed. p. 72.

own fashion : I shall begin the wall at this end and not at the other.' There the relation of master and servant does not exist, and the employer is not liable. In ascertaining who is liable for the act of the wrongdoer, you must look to the wrongdoer himself, or to the first person in the ascending line, who is the employer and has control over the work. You cannot go further and make the employer of that person liable (*m*) : that is, of course, if the person employing the contractor has employed him to do a lawful act, for if the act itself is wrongful the employer is responsible for the wrong so done by the contractor or his servants" (*n*).

How injury
to third party
may arise.

Firstly,
consequence
of master's
orders.

Sir Frederick Pollock then shows the injury for which the master may be liable may be caused in four ways :—

First. Where it is the natural consequence of the principal's orders ; there the principal is liable. In *Gregory v. Piper*, the principal told the agent to heap rubbish near the plaintiff's wall, and in the natural course of events it came against the plaintiff's wall. If, in the execution of the order, it was the necessary or natural consequence of the act ordered to be done, that the rubbish should go against the wall, the master is liable in trespass.

Secondly,
careless carry-
ing out of
master's
orders.

Secondly. Where the servant carelessly conducts his master's business, as in the ordinary running down case, where he drives over a person in the road while doing his master's business. But if he goes off on someone else's business, or on some pleasure of his own, the principal is not liable. In *Storey v. Ashton* (*o*), a carman, instead of doing his principal's business, went off in a different direction to fetch something for a friend, and while doing so ran over the plaintiff. Under the circumstances the principal was not held liable. Chief Justice Cockburn said : " The true rule is, that the master is only responsible so long

(*m*) *Per* Willes, J., *Murray v. Currie* (1870), L. R. 6 C. P. 24.

(*n*) *Ellis v. Sheffield Gas Co.* (1853), 2 E. & B. 767.

(*o*) (1869), L. R. 4 Q. B. 476.

as the servant can be said to be doing the act in the doing of which he is guilty of negligence in the course of his employment as a servant. I am far from saying if the servant, when going on his master's business, took a somewhat longer road, that, owing to the deviation, he would cease to be in the employment of the master, goes to divest the latter of all liability: in such cases it is a question of degree, as how far the deviation could be considered a separate journey."

It has, however, been held that the fact of the servant acting outside the scope of his employment, unless the act was malicious, was no defence to an action on a contract of bailment, for that the bailee undertook to take care of the thing bailed, and if it got injured by an act of a servant, although it was outside the scope of his employment, the principal was liable (*p*).

In contract of bailment principal may be liable.

Thirdly. The servant may make a mistake in the execution of his authority. As to the cases where he ordered the third party to be arrested, see the chapter on "Authority of the Agent." In *Bayley v. Manchester, Sheffield and Lincolnshire Railway* (*q*), a porter, thinking that the plaintiff was in a wrong train, pulled him out, and, as the train was in motion, he was hurt. The company were held liable. Mr. Justice Blackburn said: "The law is clear that where a servant, acting within the scope of his employment, does an act negligently or with excessive violence, the master is responsible for the consequences. In the case of *Seymour v. Greenwood* (*r*), there was great excess of violence used by the servant, and yet the master was held responsible, because the servant was acting within the scope of his employment, however outrageous and improper the manner in which he did it might be. The question here, therefore, is whether there

Thirdly, mistake in carrying out orders.

(*p*) *Coupe' Co. v. Maddick*. (1891) 2 Q. B. 413; but see *Tilling v. Balmain* (1892), 8 Times, 517.

(*q*) (1872), L. R. 7 C. P. 415.

(*r*) (1861), 6 H. & N. 359; and (1861), 7 H. & N. 355.

was evidence that the porter in what he did was acting within the scope of his employment. If he were so acting, then, however much he may have abused his authority, however improperly and blunderingly he may have acted, the defendants are liable."

Fourthly,
deliberate
wrong for
master's
benefit.

Fourthly. The principal may be liable for deliberate wrongs. We have dealt with frauds when considering whether the act be within the scope of the employment. The principal is liable for the illegal act of his servant, even if wilful, provided it was within the scope of the servant's employment, and in the execution of the service for which he be engaged. Therefore, where an omnibus driver, in racing another rival 'bus, pulled across the road and thereby forced it on a bank and overturned it, the company were held liable (*s*). But if the servant did the act not to further his master's interests, or in the course of his employment, but to satisfy some private spite, and with the object of injuring the other, the master is not responsible.

Doctrine of
common
employment

An exception has been made by decisions on the rule that the principal is liable to a third party for the negligence of his servant, namely, that he is not so where that third person is a fellow-servant of the person who has injured him. A servant, when he engages to serve a master, undertakes, as between himself and his principal, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is common master of both (*t*).

Some exceptions were made as to the generality of this rule by the Employers' Liability Act, 1880, but the subject belongs rather to the law of master and servant than principal and agent.

(*s*) *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526, and see Blackburn's judgment.

(*t*) Erle, C.J., in *Tunney v. Midland Rail. Co.* (1866), L. R. 1 C. P. 291.

Where a pilot is by compulsion of law employed on board a vessel he cannot be regarded as the servant of the owner, and the owner is not liable for his negligent acts, and, therefore, if the owner can prove that the ship was managed according to the pilot's directions, and the crew did not contribute to the accident by their acts, he is not liable (*u*).

Principal not liable for acts of compulsory pilot.

The Merchant Shipping Act, 1854 (*x*), enacts that no owner or master of any ship shall be answerable for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of a ship, within any district where the employment of the pilot is compulsory by law. To establish this exemption, as above-mentioned, it is not enough to prove that a pilot whose employment was compulsory was in charge, evidence must be given to prove that it was the pilot's fault or incapacity that occasioned the collision. In the case of the *Iona* (*y*), it was held that the owners must also prove to the satisfaction of the Court which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any one of them, that might have been in any degree conducive to the damage. On this Lord Chelmsford remarked (*z*): "If instead of saying 'they must prove,' the learned Vice-Chancellor had said 'it must be proved that there was no fault on the part of the officers and crew,' he would have been perfectly correct. The condition of exemption that the owners should prove that the accident arose entirely from the fault of the pilot is one which must be fairly interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity, must, therefore, in the absence of proof of contributory fault, be held to have satisfied the

Merchant Shipping Act.

(*u*) *The Halley* (1868), L. R. 2 P. C. 193; *The Hibernian* (1872), L. R. 4 P. C. 511.

(*x*) Sect. 388.

(*y*) (1867), L. R. 1 P. C. 426.

(*z*) *Clyde Navigation Co. v. Barclay* (1876), 1 Ap. Cas. 790.

condition on which the exemption depends, and are not called upon to adduce proof of a negative character to exclude the mere possibility of contributory fault. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions on the part of the crew may come out, and it will then be incumbent on the owners to show satisfactorily that those acts or omissions in no degree contributed to the accident."

CHAPTER XVI.

LIABILITY OF AGENT TO THIRD PARTIES.

As a general rule, an agent acting within his authority, and only as agent, is not liable to the party he contracts with personally. The rule is also stated thus:—When a man is known to be acting merely as agent of another who is also known, and acts within his authority, he is not liable at all to third parties. Agent generally not liable to third parties;

Lord Erskine said:—"No rule of law is better ascertained or stands upon a stronger foundation than this: that where an agent names his principal, the principal is responsible, not the agent; but for the application of that rule the agent must name his principal as the person to be responsible" (a). where he names his principal.

Therefore, if an agent executes a deed or other instrument in the name of his principal, he is not bound thereby; nor is he liable if he makes a contract by letter or verbally if he at the same time names his principal; for no credit is, under such circumstances, given to the agent, but to the principal. Where no credit has been given to the agent he is in no way liable.

There may be a custom, however, that the agent is liable although he names his principal, as on the Stock Exchange, or the custom that obtains between solicitors, where the Court has held that the attorney who does business universally gives credit to the attorney who employs him, and not to the client for whose benefit it But agent may be liable by custom.

(a) *Ex parte Hartop* (1806), 12 Ves. 349.

Liabie if no
authority or
exceeds it.

Chief Justice
Jervis' state-
ment of the
law.

Agent liable
for misrepie-
senting his
authority.

is done (*b*). Where the agent makes a verbal contract, and the evidence is contradictory, it is a question for the jury to decide to whom credit has been given. But the agent is liable if he does not possess any authority, or if he exceeds the authority given to him.

In *Randell v. Trimen* (*c*), Chief Justice Jervis adopts the following propositions as stated in Smith's Leading Cases. The agent is personally responsible—"Where the agent makes a fraudulent representation of his authority with intent to deceive. Where he has no authority and knows it, but nevertheless makes the contract as having such authority. Where, not having in fact authority to make the contract as agent, he yet does so under the *bonâ fide* belief that such authority is vested in him, as in the case of an agent acting under a forged power of attorney which he believes to be genuine, and the like." The agent being responsible in all these cases for misrepresentation (*d*).

The principle was also very clearly stated in *Collen v. Wright* (*e*), where Mr. Justice Willes gave a judgment, in which all the barons of the Court of Exchequer concurred, and which has since been followed, deciding that an agent who acts without authority is liable on an implied warrant of authority. He says: "A person who induces another to contract with him as the agent of a third party by an unqualified assertion of being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. . . . The fact that the professed agent honestly thinks he has authority affects the moral character of the act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no

(*b*) *Serace v. Whittington* (1823), 2 B. & Cress. 11; and *Iveson v. Conington* (1823), 1 B. & Cress. 160.
(*c*) (1856), 18 C. B. 786.

(*d*) *Polhill v. Walter* (1832), 3 B. & Ad. 114.
(*e*) (1857), 8 El. & Bl. 647, at p. 657.

way aids such person or alleviates the inconvenience and damage which he sustains.”

The misrepresentation of authority must be misrepresentation of a matter of fact, and not of a matter of law; for instance, if both parties have seen or know what the authority is, if the agent interprets it to give him larger legal powers than it actually does, he will not be liable to the third party who may have acted on such interpretation. Lord Justice Mellish, discussing the cases where an agent has been held liable, says (*f*): “If the cases are examined it will be found in all of them there was a misrepresentation in point of fact as to the agent having power to bind his principal; and though I have not found any case in Courts of law on the question, I have no doubt, myself, that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law; that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances, I have no doubt, the agent would not be liable. For instance, supposing when an agent comes and professes to make a contract on behalf of his principal, instead of trusting to his representation that he has power to bind his principal the person dealing with the agent were to ask to see his authority, and a power of attorney executed by the principal were shown to him, and he took the opinion of his lawyer as to whether the power of attorney was sufficient to bind the principal, and was advised that it was sufficient to bind the principal, and then after that a contract was made, it turned out that the power of attorney was insufficient. . . . I am clearly of opinion that there would be no warranty on the part of the agent that the power of attorney was good in

Agent to be liable for misrepresenting this authority must have made a misrepresentation as to a fact, not as to law.

(*f*) *Beattie v. Lord Ebury* (1872), on appeal (1874), L. R. 7 H. of L. Ch. 777, at p. 800; and same case 102.

point of law.” In that case three directors of a company had sent the following note to the bankers of the company:—

“Watford and Rickmansworth Railway.

“Gentlemen,

“Please to honour the cheques of this company, signed by two of the directors, and countersigned by the secretary,”

and then followed the directors’ signatures. The account having been overdrawn, the bankers tried to hold the directors liable. The question to be decided was, whether the directors were personally liable on that letter as an untrue representation that they had power to overdraw. The Court held that the letter only represented that there was such company in existence, that they were directors of it, and had the powers of ordinary directors, and that if there were a misrepresentation as to their powers (which the Court was inclined to think there was not) it was a mistake of law for which they were not liable. In another case, where the directors indorsed a bill of exchange for and on behalf of their company, which had no power to accept bills, the directors were held personally liable on the ground that such indorsement amounted to a misrepresentation of a matter of fact—namely, that the company had power to accept, a representation which was untrue—and that it was a misrepresentation to the person in whose hands the bill had come without knowledge of the limitation in the company’s powers (*g*).

Where both agent and third party make contract under a mistake, agent not liable.

Where both the third party and the agent enter into a contract under a mistaken impression, intending to bind the principal when he cannot be made liable, the agent will not be liable on the contract (*h*). Thus, where in an action brought by a solicitor for legal services rendered to a

(*g*) *West London Commercial Bank v. Kitson* (1883), 12 Q. B. D. 157, at p. 161; affirmed (1884), 13 Q. B. D. 360.

(*h*) *Jones v. Hope* (1886), 3 Times L. R. p. 238 (note); and see *Hawke v. Cole* (1890), 62 L. T. 658.

volunteer corps against the commanding officer of a volunteer regiment, it appeared that the plaintiff and defendant both mistook the law, and, thinking the corps was an entity recognised by the law, and could contract, intended to make a contract with the corps, it was held that the defendant, who was contracting as agent, was not liable. The Master of the Rolls said: "Where [the person with whom the contract was supposed to have been made knows all the circumstances just as much as the agent himself—knows the agent is not authorized—and then chooses to take the credit of the person when he knows the agent is not authorized to pledge it, in such a case I cannot think that an action would lie. But that is not the case here at all. Here the defendant and the plaintiff both knew, or assumed, that this contract was being made with the corps, and neither of them knew that no such contract could be binding on any of them. . . . Well, there is no contract with Colonel Durnford, and judgment ought to be entered for Colonel Durnford."

Where the agent signed a charterparty, "per telegraphic authority," evidence was admitted to prove that such form of signature was commonly adopted in order to negative the implication of any further warranty than that he had received a telegram which, if correct, authorized the charterparty that was signed; and the agent was therefore not held liable for a mistake in the telegram as to the rate of freight offered (*i*).

Effect of contracting per "telegraphic authority."

The agent is liable to the third party where he assumes to act for a principal who is insane and incapable of giving an authority. Lord Justice Brett said, in *Drew v. Nunn* (*k*): "It seems to me that an agent is liable to be sued by a third person if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act. In a case of that kind he is acting wrongfully. . . .

Agent liable if principal insane.

(*i*) *Lilley v. Smales*, (1892) 1 Q. B. 456. (*k*) (1879), 4 Q. B. D. 661.

In my opinion if a person who has not been held out as agent assumes to act on behalf of a lunatic, the contract is void against the proposed principal, and the pretending agent is liable to an action for misleading an innocent person."

Measure of
damages
against agent.

The damages to be recovered against the agent are what was lost to the third party by not having the valid contract which the agent warranted he had; and thus if the principal were solvent the damages would be the amount of the profit lost by the third party; if the principal were not solvent it would only be a nominal sum (*l*).

In *Collen v. Wright* (*m*) the agent represented he had authority to make an agreement for a lease. The principal refused to give the lease, and then the third party brought an action for specific performance. In his defence the principal set up that the agent had no authority to make the agreement. The third party gave the agent notice of the defence, and that he would proceed with the action unless the agent gave him notice not to do so, and claim the costs of it against the agent. The agent did not take any notice, and the action proceeded. Specific performance was refused on the ground of want of authority. The third party then brought a second action against the agent, and the Court gave him as damages both the amount he had expended on the improvements of the farm, in the belief that he was entitled to a lease, and also the costs of the Chancery action. On appeal, this decision was affirmed in the Exchequer Chamber, and it was approved of in *Richardson v. Williamson* (*n*) by Lord Blackburn, and in *Beattie v. Lord Ebury* (*o*). In *Re The National Palace Co.* (*p*), brokers who, by mistake, applied for shares in a company were held liable to the liquidator of the company for the full value of the shares, as the brokers'

(*l*) *Simons v. Patchett* (1857), 7 El. & Bl. 568.

(*m*) (1857), 7 El. & Bl. 301; 8 El. & Bl. 647.

(*n*) (1871), L. R. 6 Q. B. 276.

(*o*) (1872), 7 Ch. 777, at p. 805; and same case on appeal (1874), 7 E. & L. Ap. 102.

(*p*) (1885), 24 Ch. D. 367.

client was a solvent person. And in *Meek v. Wendt* (q), where agents, thinking they had authority, settled a claim under a judgment for 300*l.*, they were held liable for the whole amount and the costs of the negotiations, as that was the amount they had warranted the third party, and he lost through the negotiations falling through. The agents' principals being foreigners with no assets in the jurisdiction, and the judgment therefore worthless. The measure of damages being what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the agent had the authority he professed to have.

The agent is also personally liable to third parties if he has no principal in existence; although he purports only to sign as agent. Thus, where an agent signed a contract for the purchase of some wine as agent for a company which had not come into existence, Chief Justice Erle said (r): "The cases referred to in the course of the argument fully bear out the proposition that where a contract is signed by one who professes to be signing 'as agent,' but who had no principal existing at the time and the contract would be altogether inoperative, unless binding upon the person who signed it, he is bound thereby, and a stranger cannot by a subsequent ratification relieve him from responsibility."

Agent liable where he has no principal.

Where there is no responsible principal whom the third party can sue, the agent will be held liable (s), unless it can be shown that no credit was given to him, and that the third party relied solely on some fund for payment. A club is no legal entity; therefore the executive committee who have acted for it are held *prima facie* liable personally (t).

Agent of club.

As the agent is held liable where he has no principal, although he purport to contract only as agent, so he is also

Navigation commissioners,

(q) (1888), 21 Q. B. D. 126.

(r) *Kelner v. Baxter* (1867), L. R. 2 C. P. 174.

(s) *Kelner v. Baxter* (1867), L. R. 2 C. P. 174; but see *Jones v. Hope*

(1886), 3 Times L. R. 348.

(t) *Steele v. Gourley* (1886), 3 Times L. R. 118, 772; see also *Draper v. Earl Manvers* (1893), 9 Times, 73.

church-
wardens, &c.

liable where he purports to contract for a principal who is incapable of contracting. It is on the above principle that commissioners for making a river navigable, and inclosure commissioners, have been held to be personally liable (*u*). In *Furnival v. Coombes* (*v*) the churchwardens and overseers of a parish entered into a covenant to pay for the repair of the parish church, and provided in the deed that they should not be personally liable; but the Court held that they were personally liable, and rejected the proviso as inconsistent with the covenant.

Exception.

But if the agent can prove or it can be shown clearly (*x*) that it was well known that the agent did not intend to bind himself, and that the third party did not rely on his credit, but only on some fund, as sometimes happens in the case of charitable societies, no one will be liable (*y*).

Agent liable
when exclu-
sive credit
given him.

Again, the agent may be personally liable, because exclusive credit was given to him: thus, in the words of Mr. Justice Bayley, "The seller who knows who the principal is, and, instead of debiting that principal, debits the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal" (*z*).

Agent liable
if he contracts
as principal.

An agent is also liable if, at the time of making the contract with the third party, he does not disclose the fact of his agency and treats with the third party as principal. Evidence may be given by the third party to show that the agent was an agent so as to make the principal liable also; but the principal will remain bound all the same, and cannot give parol evidence to relieve himself of liability.

Lord Denman said: "There is no doubt that evidence is admissible on behalf of one of the contracting parties to

(*u*) *Horsley v. Bell* (1778), 1 Brown, Ch. 101 (note); *Eaton v. Bell* (1821), 5 B. & Ald. 34.

(*v*) (1813), 5 Man. & Gran. 736.

(*x*) *Pink v. Scudamore* (1831), 5 C. & P. 71.

(*y*) *Overton v. Hewitt* (1886), 3 Times, 246; *Jones v. Hope* (1886), *Ibid.*; *Hawke v. Cole* (1890), 62 L. T. 658.

(*z*) *Thomson v. Davenport* (1829), 9 B. & C. 78, at p. 89.

show that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear that if the agent contracts in such a form as to make himself personally responsible he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from the responsibility"(a).

But if the agent had become a party to the contract in his own name, on an understanding that he should not be liable on it, the Court has allowed evidence of such understanding to be given. Thus, in *Wake v. Harrop* (b), where the agents signed a charterparty as agent, but bound themselves personally as freighters in the body of the document, they were allowed to prove that it was agreed between themselves and the third party that they were not to be liable on the charterparty as principals.

The principle that an agent is liable if he contracts in his own name is most strictly adhered to in the case of deeds. For no one can sue on a deed except a party thereto, and it is only binding on the parties thereto (c). In *Wilks v. Back* (d), it was decided that one who executes a deed for another under a power of attorney must execute it in the name of his principal; but if that be done, it matters not in what form of words; such execution is denoted by the signature of the words. The 46th section of the Conveyancing Act makes the rule less strict; but *Prideaux* in his *Precedents of Conveyancing* (e) says that it is still the proper way to execute a power of attorney in the name of the principal, and this must clearly be so, for otherwise it is not clear who are the real parties. Messrs. Hood and Challis, in their work on the Conveyancing Acts, also think that the principal, and not the attorney, ought to be named.

Agent liable if he contracts as principal, especially if by deed.

(a) *Jones v. Littledale* (1837), 6 Ad. & Ell. 486, at p. 490.

(b) (1861), 6 H. & N. 768; and (1862), 1 H. & C. 202.

(c) Story, § 147. See, however, *Sunderland Marine Insurance Co. v. Kearney* (1851), 16 Q. B. 925.

(d) (1802), 2 East, 140.

(e) 15th ed. vol. ii., p. 777.

Rule modified
by Convey-
ancing Act,
sect. 46.

The 46th section of the Conveyancing Act, 1881, which came into operation immediately after the 31st December, 1881, enacts that "the donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and thing so executed and done shall be as effectual in law to all intents as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

"This section applies to powers of attorney created by instruments executed either before or after the commencement of the Act."

Laurie v. Lees (*f*), decided before the Act, was a case in which an action was brought against the principal and not against the agent as in *Wake v. Harrop* (*g*). The third party sought to have a lease declared binding on the principal which had been executed by his agents. For the principal it was contended that agents (who were acting as committee of a lunatic) had not properly executed a deed so as to bind their principal, because they had signed and sealed it in their own names, as follows:—"In witness whereof the parties to these presents have set their hands and seals"; but the Court held that it was a good execution of their authority, and that it bound the principal, and not the agents.

Commercial
agent not
liable if prin-
cipal named;

In the case of commercial agency, if the principal is named, it has been decided that a broker is not a contracting party (*h*) at all, and he therefore cannot be sued. In such a case, Baron Pigott said, "on the plain construction of the contract, the plaintiff (the agent) is no party to it, but only signs, as broker, bought and sold notes for the respective parties." The contract before him was as follows:—"I have this day sold you on account of

(*f*) (1881), 7 Ap. Cas. 19.
(*g*) (1862), 1 H. & C. 202.

(*h*) *Fairlie v. Fenton* (1870), L. R.
5 Ex. 169.

Mr. Timmins, &c. E. Fairlie, broker.” Chief Justice Cockburn (*i*), commenting on that decision, says: “I am of opinion that the same principle would apply where the principal is not named, so long as it appears on the face of the contract that the broker is contracting as broker for a principal, and not for himself as principal; and in that case also the broker would not be liable on the contract if the principal failed to fulfil his contract.”

This non-liability of the agent may be altered, if by custom brokers in the particular business make themselves liable. Thus, the Chief Justice in the same case continues: “But I think, nevertheless, that the evidence of the custom was admissible, and that after that evidence had been given, the brokers were properly held liable on the contract. For although, where a party contracts as agent, there would not, independently of some further bargain, be any liability on him as principal, yet if a man, though professing on the face of the contract to contract as agent for another, and to bind his principal only, and not himself, chooses to qualify the contract, he himself will incur the same liability as his principal.” In the particular case, a custom was proved that in the London fruit market a broker was liable unless he gave the name of his principal. In another case (*k*), evidence was received of a custom by which, if the principal’s name was not disclosed within a reasonable time, the agent was held liable. Again, in *Pike v. Ongley* (*l*), where the contract was as follows:—“Sold by Ongley and Thornton to Messrs. Pike, for and on account of the owner, 100 Hallertau Bavarian hops”; and evidence was given to show that, by the custom of the hop market, when the principal is not disclosed at the time of making the contract, the broker is in fact regarded as principal, and held liable. Lord Esher

By custom of trade the agent may be liable.

(*i*) *Fleet v. Murton* (1871), L. R. 7 Q. B. 126.

(*k*) *Hutchinson v. Tatham* (1873), L. R. 8 C. P. 482.

(*l*) (1887), 18 Q. B. D. 708.

said: "In this case, the defendants (the agents) are clearly not liable upon the contract itself. If they were selling as agents for an owner and in the absence of trade usage, no liability would attach to them. The evidence of the witnesses who were called to prove custom came to this, that if the name of the owner was not given in or at the time of making the contract, the buyer might sue either the principal or the broker. . . . The meaning of the custom is that, where the principal's name is not disclosed in or at the time the contract is made, the buyers reserve to themselves the right of suing the broker or factor;" and he held that though the brokers were not liable on the contract, they were so by reason of the custom, evidence of which might be properly admitted.

Custom, when necessary to prove and how proved.

Lord Esher, in *Ex parte Reynolds, In re Barrett* (m), discusses how a custom ought to be proved, and when judicial notice will be taken of a custom. "It is," he says, "a question of fact whether a particular habit or custom does or does not exist in a particular business, and whether it is generally known among the persons who deal with the particular class of traders. The question must at first be tried upon the evidence in the particular case. It must certainly be tried in this way more than once (*i.e.*, than at one trial), but if the thing is proved several times in the Courts, and is adopted by the Superior Courts, the Court, after that, will take judicial notice of it, and will not require it to be proved again in any subsequent case.

But where agent contracts in his own name, without qualification, he is liable.

Effect of signing "as agent."

Where an agent contracts in his own name without any qualification, he is personally liable (n).

In a number of cases where a contract was signed "as agent," the Courts decided that the words "as agent" were merely words of description, and that the agent was personally bound (o). It seems now, however, established

(m) (1884), 15 Q. B. D. 169, at p. 184.

T. 375.

(n) *Hicks v. Tweedley* (1890), 63 L.

(o) See *Paice v. Walker* (1871), 5 Ex. 173.

law, that such words are to be construed as meaning that the agent signs only as agent and is not personally liable. Lord Justice James, in *Gadd v. Houghton* (p), the case that altered the law, said, "The *ratio decidendi* in *Paice v. Walker* was that, having regard to the contract and all the circumstances of the case, the words 'as agents' must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain 'on account of' another person. Those are the very words used in the present case. When a man says that he is making a contract 'on account of' some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself but is binding his principal. As to *Paice v. Walker*, I cannot conceive that the words 'as agent' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea. If that case were now before us, I should hold 'as agents' in that case had the same effect as the words 'on account of' in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, but I do not think 'as agents' were words of description" (q).

As we have seen, where the agent contracts on behalf of an unknown principal, or by a custom in which the third party can hold him liable, the third party has a right to elect whom he will sue, whether the principal or the agent. When he has once elected to sue the principal the agent will no longer be bound. The third party does not elect bindingly until he knows who the principal is.

Lord Tenderden states the rule thus: "I take it to be a general rule that if a person sells goods (supposing, at the

When third party can elect whom to sue.

How long third party can elect.

(p) (1876), 1 Ex. Div. 357.

(q) See also Sir G. Jessel in *Southwell v. Bowditch* (1876), 1 C.

P. D. 374; and Mr. Justice Charles in *Glover v. Longford* (1892), 8 Times, 628.

time of the contract, he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction but agent for a third party, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between principal and agent is not altered to the prejudice of the principal."

He then deals with the case before him, which was one where the third party knew that the agent was an agent but did not know who the principal was, and held that the third party is not deemed to have made any election so as to bind him to have elected to have given the exclusive credit to the agent until he knows who the principal is (*r*). Story states (*s*) the rule thus: "When acting as a known agent he does not disclose the name of his principal; then, though credit is given to the agent, it is not deemed to be exclusive credit. On the contrary, when the principal is discovered he also will be deemed responsible as well as the agent."

Primâ facie
agent liable,
though
known as such
if principal
undisclosed.

Primâ facie an agent when contracting for an undisclosed principal is personally liable although he is known to be an agent; for it is unlikely that credit should be given to a person whose name is altogether unknown. It is also unlikely that where the principal is a foreigner and outside the jurisdiction of the Court, a person would prefer to trust him, rather than look to the agent in England whom he knows and can sue.

If named
foreign prin-
cipal, matter
of evidence
whether
agent liable.

At one time it was considered that there was a universal understanding among merchants and all persons in trade that when the principal was a foreigner, credit was given to the agent and not to the principal, and that the agent was liable; but it now seems that there is no presumption either way, and that it is always a question as to what was

(*r*) *Thomson v. Davenport* (1829),
9 B. & C. 78; and see cases cited
in Chapter on Liability of Prin-

cipal to Third Party, p. 230.
(*s*) § 291.

the intention of the parties (*t*). In *Glover v. Langford* (*u*), Mr. Justice Charles—after first pointing out that though in the earlier cases signing “as agent” would not have prevented the agent being held liable, the true rule is now laid down in *Gadd v. Houghton* (*x*), where the Court of Appeal held that the words “on account of” were sufficient to show that the agent did not intend to make himself liable on the contract, and overruled *Paice v. Walker* (*y*)—says: “I must look at the contract to find out the question of agency—and that alone, and not the previous dealings of the parties. The principals of the defendant were Messrs. Young & Co. of Riga, and the plaintiff knew this by March, as the defendant had in a specification told them so. (The contract was worded thus: ‘Bought by Messrs. C. H. Glover & Co. of Hatcham, of Messrs. John E. Young & Co. of Riga, through the agency of Mr. J. B. R. Langford.’) I must read the contract to mean Messrs. Young & Co. will supply the goods, and the plaintiffs knew therefore that they were entering into a contract with Langford for a foreign principal. Then it is said by a rule universally acted upon, and which has become a rule of law, there can be [not?] the relation of principal with the English agent under such circumstances, and I was referred to Mr. Justice Blackburn’s decision in *Armstrong v. Stokes* (*z*). It is therefore said Mr. Langford ought to be charged as principal. In referring to the other cases, it appears that *in point of law there is no distinction as to the liability of an agent acting on behalf of an English or a foreign principal*; it is always a question of fact, and no doubt the circumstance that an Englishman is acting for a foreigner is a circumstance of great weight. On the other hand, when he is acting for a foreign prin-

(*t*) *Green v. Kopke* (1856), 18 C. B. 549; *Hahn v. North German Pitwood Co.* (1892), 8 Times L. R. 537.

(*u*) (1892), 8 Times L. R. 628.

(*x*) (1876), 1 Ex. Div. 357.

(*y*) (1871), L. R. 5 Ex. 173.

(*z*) (1872), L. R. 7 Q. B. 598.

principal, that ought to be remembered. In *Green v. Kopke* (a), the judgment has the following sentence:—‘In any case it is a matter of intention to be gathered from the contract itself and the surrounding circumstances.’ The case is not an authority for the defendant, but lays down it is a question of intention.” His lordship then gave judgment for the agent—the defendant.

It seems, however, only fair that, in accordance with the older cases, the onus should be on the agent of a foreign principal to show he is not liable (b): unless there is something in the nature of the contract and the agent’s interest in its performance that showed it was highly unlikely that it could have been intended that he should be personally bound.

Broker’s
contract.

Unless the agent happens to be a broker, the fact that he makes the contract in his own name will make him liable on the contract (c), the reason being that by the form of the contract he has made himself a direct personal party to it.

Some agents
act in double
capacity of
agent and
principal.

According to the ordinary course of trade certain agents are, though only agents, liable as principals. On the Stock Exchange the stockbroker deals with his principal as principal, and in the same way, insurance agents are not only agents but principals. Mr. Justice Bayley then described the insurance agent’s position (d). According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured does not in the first instance pay the premium to the broker, nor does the latter to the underwriter; but as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he only to

(a) (1856), 18 C. B. 549.

(b) *Thomson v. Davenport* (1829),
9 C. B. 78; *Mahony v. Kekule* (1854),
14 C. B. 390.

(c) *Norton v. Herron* (1825), 1 C.
& P. 648.

(d) *Power v. Butcher* (1829), 10
B. & C. 329.

the assured. The latter pays the premiums to the broker only, who is a middleman between the assured and the underwriter. But he is not merely an agent; he is a principal to receive the money from the assured and pay it to the underwriters.

The liability of an agent may also arise by implication from his own acts with reference to a contract to which he was not originally a party.

By the first section of the Bills of Lading Act, 1855 (*e*), "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom property in the goods mentioned therein shall pass upon, or by reason of such consignment or indorsement shall have transferred to him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made by himself."

Agent may make himself liable by indorsing bill of lading.

And it has been held that whoever receives goods under a bill of lading as consignee or assignee, contracts by implication to pay the freight due on them (*f*).

Mr. Justice Cave, dealing with this right in *Allen v. Cottart* (*g*), says: "As far back as 1811, it was held in *Cock v. Taylor*, that where the master of the ship had contracted by bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading without freight having been paid, was evidence of a new agreement by him, as the ultimate appointee of the shippers for the purpose of delivery to pay the freight due for the carriage of such goods, the delivery of which was stipulated to be made to the consignees named in the bill, or their assigns, he or they paying freight for the said goods. It

(*e*) 18 & 19 Vict. c. 111.

3 Bing. 383.

(*f*) *Cock v. Taylor* (1811), 13 East, 399; *Dougal v. Kemble* (1826),

(*g*) (1883), 11 Q. B. D. 782.

is true that that decision only extends to payment of freight, but that is because that was the only condition of delivery in the bill of lading then under consideration. The ground of the decision is, that where goods are deliverable to the holder of a bill on certain conditions being complied with, *the act of demanding delivery is evidence of an offer on his part to comply with those conditions*, and the delivery by the master is evidence of his acceptance of that offer (*h*). Thus, when the bill of lading stipulates on the face of it for the payment of demurrage, it was held that the taking of goods under it by the indorsee was evidence of an agreement to pay demurrage, see *Stindt v. Roberts* (*i*)."

If an agent puts his name on a bill, all the legal consequences of the act attach as much as on any other party whose name is thereon: so if a broker employed to sell goods, sells them for a bill of two months drawn on the buyer for the amount, he is answerable on the bill, even to the principal (*k*).

It is very difficult to say in some contracts whether the agent is bound, and whether the form imports a personal liability on behalf of the agent. The question has been discussed at some length in the chapter on the "Duties of an Agent" as to what the form of the contract should be if he is not to be liable on it.

By a custom the third party may hold the agent liable, though he knows principal;

There may be a custom for the agent to be held responsible, and then, though the principal may be well known, the agent is liable (*l*). This is what happens on the stock exchange among stock brokers, and between a solicitor and his London agent, though perhaps the relation between a solicitor and his London agent is better

(*h*) See also *Wilson v. Kymmer* (1813), 1 M. & Sel. 157; *Möller v. Young* (1855), 25 L. J. Q. B. 94. (*i*) (1848), 5 D. & L. 460.

(*k*) *Leferre v. Lloyd* (1814), 5 Taunt. 749; and see *Simpson v. Swan* (1812), 3 Camp. 291.

(*l*) *Scrace v. Whittington* (1823), 2 B. & C. p. 13.

explained on the ground of a sub-agency, which created no privity of contract between the sub-agent and the principal.

Masters of ships are always personally liable on contracts for necessities and repairs, wages, &c., for their ships, unless by express terms the credit is confined to the owner alone (*m*): as to the liability of the owners, see the chapter dealing with the "Liability of the Principal to Third Parties."

e.g., masters of ships.

Where an agent receives money for his principal he cannot be sued for it by the third party, as there is no privity of contract between them. Thus, if a third party paid a deposit to the agent on the purchase of a property or goods, he cannot bring an action against him for it, whether he frames his action in contract, trover, or detinue. An agent so receiving money is in no fiduciary position to the third party (*n*). And this is so even where the agent has not handed over the money to his principal, but recouped himself out of it for outlays for the principal. Lord Esher said, in such a case where the third party sued the agent to recover a deposit: "Here the deposit was paid to the vendor's solicitor on account of, and as agent for, the vendor, for the purpose of handing it over to the vendor. That was a payment to the vendor through his agent. The plaintiff, therefore, paid the deposit to the defendant, Jackson, as agent for Goulton. The title not being made out, the purchaser was entitled to the return of the deposit; Jackson never was in the relation of agent to the purchaser. He was acting solely as agent for the vendor. There never was any relation between him and the purchaser. There was, therefore, no fiduciary relationship between them. In all the cases referred to, the distinction has been pointed out between a stakeholder, who could be

Agent cannot be sued by third party for money paid him on behalf of the principal: for there is no privity of contract between him and the third party.

(*m*) Abbott's Merchant Shipping, 13th ed. p. 131.

(*n*) *Ellis v. Goulton*, (1893) 1 Q. B. 350; and see *Duke of Norfolk*

v. Worthy (1808), 1 Camp. 337; *Edgell v. Day* (1865), L. R. 1 C. P. 80.

an agent for both parties, and a person who was agent only for one" (*o*). It is immaterial whether he has paid the money over or not; the moment the money was in the agent's hands, it is virtually in the principal's (*p*), and the third party's only remedy is against him.

In *Stephens v. Badcock* (*q*), a parishioner paid his tithes to the defendant, an attorney's clerk, who received them by his master's order. The attorney was acting as agent for the rector, and absconded, and then the action was brought by the rector against the clerk to recover the amount paid for tithes to him. The tithes did not appear to have been paid over by the clerk to his principal, the solicitor, as he had absconded before the date of the payment to the clerk, who thought he was only away on business. Lord Tenterden held, nevertheless, that the action did not lie, as there was no privity of contract between the plaintiff and defendant.

But agent can
be sued where
stakeholder.

It is different when the agent is a stakeholder; but there is no presumption of law when the solicitor for the vendor receives a deposit from the purchaser, that he receives it as stakeholder (*r*).

The principle that an agent is liable if he pays over money to his principal after notice not to pay it, seems only to apply to agents who are in the position of stakeholders, such as auctioneers, who receive the deposit as stakeholders for both parties (*s*). At least, the writer has been unable to find any other case where such a principle has been acted on; and Mr. Justice Coleridge, in *Bamford v. Shuttleworth* (*t*), held it was quite immaterial, when once the money had been handed to the agent, whether it had been handed over as the agent's possession or as that of the principal.

(*o*) *Ellis v. Goulton*, (1893) 9 Times, 223; see, also, *Sadler v.*

Evans (1766), 4 Bur. 1984.

(*p*) *Bamford v. Shuttleworth*

(1840), 11 Ad. & El. 926.

(*q*) (1832), 3 B. & Ad. 354.

(*r*) *Edgell v. Day* (1865), 1 C. P. 80.

(*s*) *Edward v. Hodding* (1814), 5 Taunt. 815.

(*t*) (1840), 11 Ad. & El. 926.

If the money has been paid to the agent on an illegal claim on his part, as by a jailer for the price of a room (*u*), or to avoid an illegal distress, it is no defence that he has paid it over (*x*), nor is it if he has paid it over illegally, as an auctioneer, who is a stakeholder, paying over a deposit to the vendor before the title was made out (*y*).

Illegally claimed money no defence that paid over.

Mr. Story says, that if the illegality of the demand is not known to the agent, and no objection on that ground is made before the money is paid over, the agent is not liable (*z*).

It has also been held that the third party cannot sue the agent to enforce a claim he has to money deposited by the principal in the agent's hands without joining the principal as a party to the action (*a*). Money had been deposited in the hands of the agent-general of a colonial government as security for the performance of a contract. The contract had been performed, and a lien on the money was then given by the contractors to their bankers. The agent-general having withdrawn the money from the bank and paid it to his colonial government, the bankers who asserted a lien on the money sued the agent-general, upon the footing that he had constituted himself a trustee for the contractors. The Court, however, held that he could not be sued in the absence of his principal, the colonial government, and said it is not a mere question of formal parties, it was really an attempt to enforce this contract between the colonial government and Firbank (the contractors) without having the colonial government here.

If money of principal is deposited in agent's hands, he cannot be sued by third party without making principal party to action ;

If, however, money has been paid to an agent from a pure mistake of fact on behalf of the principal, and the agent had not paid over the money to his principal and nothing else has been done by him to change his circum-

unless the money has been paid to the agent by mistake.

(*u*) *Miller v. Aris* (1800), 3 Esp. 230.

(*x*) *Snowden v. Davis* (1808), 1 Taunt. 358.

(*y*) *Edward v. Hoddington* (1814), 5 Taunt. 815.

(*z*) Story, § 301.

(*a*) *Wright v. Mills* (1890), 63 L. T. 186.

stances the agent is, according to *Cox v. Prentice* (*b*), liable to the third party for money had to his use. In that case the third party paid the agent 88*l.* at so much an ounce, on the assumption that a particular bar, as tested by an assay, contained so many ounces of silver, and then brought the action to recover what he had overpaid, on it turning out that the bar did not answer the assay. How far that case is still law, however, is questionable, unless it is to be supported on the ground that as the agent was acting for a foreign principal he was personally liable.

But where agent not merely an agent, but in some sense a principal, money paid can be recovered from agent.

In two cases where the agent was not merely an agent but in some sense a principal, money was held to be recoverable from the agent which had been paid to the agent, and to which the principal had no title. In the first case, *Buller v. Harrison* (*c*), the agent (the defendant) was an insurance broker, and the money sought to be recovered was paid by the plaintiff, the underwriter, in discharge of a loss which turned out to be a "foul loss," and the Court held that, as there had been no payment over to the principal, the agent was liable. There had been a settlement in account, but this had caused no alteration, as the Court found, in the situation in which the agent and his principal stood to one another; there had been in consequence no new credit opened, no acceptance of new bills, no fresh bills bought, or money advanced. As Mr. Justice Bayley pointed out (*d*), the position of insurance broker is not that of an agent pure and simple, for the underwriter looks to the broker alone, and he is unknown to the principal. "The principal pays the premium to the broker only, who is a middleman between the assured and the underwriter. But he is not merely an agent; he is a principal to receive money from the assured and to pay it to the underwriter." In the second case, *Newall v. Tomlinson* (*e*),

(*b*) (1815), 3 M. & Sel. 344.

(*c*) (1777), 2 Cowp. 565.

(*d*) *Power v. Butcher* (1829), 10 B. & C. 329.

(*e*) (1871), L. R. 6 C. P. 405.

the plaintiffs were cotton brokers, and bought of the defendants, who were also cotton brokers, seventy-four bales of cotton. Both plaintiffs and defendants were acting for undisclosed principals, according to the usage of the market; each treated the other as principals. By a mistake on the part of the defendants in adding up the weights, the plaintiffs paid too much. Before finding out this mistake the defendants allowed the sum in their accounts to the principals. The Court held that the plaintiffs were entitled to recover the money on the ground that the defendants were not mere agents and did not receive the money to their principals' use but to their own.

It will be noticed that in both these cases the money had not been paid over, and the agents were not agents pure and simple, but acting by virtue of the custom of trade as principals. In the latter, again, the agents' own mistake led to the payment of the money which was sought to be recovered, and it was clearly not right that the agents should profit by it. But it is different where the money had been paid over before the third party made any claim for its repayment.

In *Holland v. Russell* (f), the agent, an insurance broker, was sued to recover money paid to him by the underwriter under a voidable insurance. He had settled the amount with his principal before he knew the policy was to be disputed. Chief Justice Cockburn found for the defendant; while recognizing the authority of *Cox v. Prentice* and *Buller v. Harrison*, he distinguished the case before him on the ground that in those cases the account between the parties was still open, and the position of the agent was not prejudiced by having to refund the money, while here it was a settled account. In affirming that decision, Chief Justice Erle said, "The defendant having been

If money paid over to principal agent not liable to repay.

(f) (1861), 1 B. & S. 424; affirmed (1863), 4 B. & S. 14.

altogether an agent in the matter, is there anything which takes him out of the ordinary protection to which an agent is entitled who pays money to his principal before he received notice not to pay it, and before he knew there was no legal duty on him to do so?" This case was followed in *Shand v. Grant* (g).

Third party cannot, having voluntarily paid, sue him to try right against principal.
Only payee of money can prevent payment to principal.

Agent assenting to hold money which he has to third party's use liable.

A person will not be allowed voluntarily, and when under no mistake, to pay money to an agent, and then try the principal's right to the money in an action against the agent, but is obliged to bring an action against the principal himself (h). Only the person who pays the money to the agent appears to have the right to prevent him paying it over to his principal. A person with whom the agent has no contractual relations, and who is merely interested in the money (i), has no such right.

An agent may also make himself liable to a third party if he receives directions from his principal to hold money in his, the agent's hands to the use of the third party, and contracts to carry out the principal's directions, and then refuses to pay it over. He is not bound, however, to assent to such appropriation, and, if he does not, will not be liable to the third party, as there is then no privity between them (k). Until the agent agrees with the third party to pay it over the principal can revoke the authority to do so. When the agent has once consented to hand over the money to the third party, he is bound to do so, and can be sued for it (l). It is a question of fact whether the letters, &c. of the agent amount to an agreement to pay over the money.

Agent dealing with property after principal's ownership ceased,

If the agent's authority has determined by his principal's property in the subject-matter of the agency ceasing, the agent will be liable for any dealing with it, however

(g) (1863), 15 C. B. N. S. 324.

(h) *Sadler v. Evans* (1766), 4 Burr. 1984 (*Lady Windsor's Case*).

(i) *Stephens v. Badcock* (1832), 3 B. & Ad. 354.

(k) *Williams v. Everett* (1811), 14 East, 582.

(l) *Malcolm v. Scott* (1850), 5 Esp. 601.

innocent, which he cannot justify against the new owners. Thus, where a principal became bankrupt, and after his property had vested in his assignees in bankruptcy, the agent, on his principal's request, paid money to the principal, he was held liable to the assignees for the money he had so paid, although he made the payment innocently to the principal, not knowing of the bankruptcy (*m*). liable for conversion.

As has been already pointed out, an agent is, as a rule, when he has contracted as agent for a known principal, not liable on the contract. Hence he is not liable for any neglect in carrying it out to third persons if his principal has entrusted him with that duty, but is liable to his principal alone. Non-feasance and omissions of duty do not give rise to any action by third parties against him; because they arise only out of the contract. With respect to acts of misfeasance or positive wrongs which are torts he is, however, liable; for no authority whatsoever from a principal can furnish to anyone a just defence for his own positive torts and trespasses, as no man can authorize another to do a wrong (*n*). In *Lane v. Sir R. Cotton* it was sought to make a deputy postmaster liable for the loss of some letters, Chief Justice Holt says (*o*): "For neglect in him they (the plaintiffs) can have no remedy against him, for they must consider him only as a servant, and then his neglect is chargeable on his master or principal, for a servant or deputy *quatenus* such cannot be charged for neglect, but his principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, *but as a wrongdoer*. *A fortiori*, no action will lie against him either for the negligences and misfeasances of sub-agents whom he is authorized to employ, and who are therefore the agents of the principal, unless, perhaps, he had par-

Non-feasance by agent gives no right of action to third party.

(*m*) *McEntire v. Potter* (1889), 22 Q. B. D. 438.

(*o*) *Lane v. Sir R. Cotton* (1700), 12 Mod. p. 488.

(*n*) Story, § 309.

ticularly ordered the acts to be done from which the damage ensued" (*p*).

Master of ship excepting in breach of rule.

There is one important exception to this rule, namely, that of the master of a ship, which arises from the fact that he is not merely an agent, but a principal, according to maritime law, and who is, therefore, in the latter capacity liable for the non-feasances and neglects of duty of the crew (*q*).

Public agents.

Public agents of a government are, however, liable for their own misfeasances, as their principal is not liable (*r*); but they are not liable for those of their employees, provided they have employed persons of suitable skill and ability. The maxim of *respondeat superior* applies in the case of agency unless the agent has wilfully done the wrong. This maxim "is bottomed on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it" (*s*).

Agent assisting in breach of trust liable.

An agent assisting in a breach of trust is personally liable together with the trustees, his principals (*t*).

An agent is also liable in tort to third parties, and it is no defence for him to allege his principal's orders: a man who has done a wrong is responsible for it. And this is so although he acts *bonâ fide*, and believing his principal has a right to give him the directions (*u*).

Agent liable for personal negligence.

The law is thus laid down in Addison on Torts (*x*):—"The person who actually inflicts the injury through his own negligence is of course always responsible for the injurious consequences of his default." And in *Bates v. Pilling* (*y*) it was held that both principal and agent might be sued jointly for damages. Mr. Bevan (*z*) points out

(*p*) See, also, *Stone v. Cartwright* (1795), 5 Term Rep. 411.

(*q*) *Nicholson v. Mounsey* (1812), 15 East, 384.

(*r*) *Whitfield v. Le Despencer* (1778), Cowper, 754.

(*s*) *Per Best, C. J.*, in *Hall v. Smith* (1824), 2 Bing. 156.

(*t*) *Attorney-General v. Corporation of Leicester* (1846), 9 Beav. 546.

(*u*) *Mill v. Hawker* (1875), L. R. 10 Ex. 92; *Bates v. Pilling* (1826), 6 B. & C. 38.

(*x*) 6th ed. p. 116.

(*y*) *Ubi supra*.

(*z*) Law of Negligence, p. 412.

that the obligations which the law imposes on all persons independently of contract cannot be affected by the constitution of relations [such as those of principal and agent] to which the injured person is not a consenting party; and as a person is liable for any injury he may do to the person or property of another by force of his position as a member of the community and one subject to its laws; so his own act in putting himself in relations of subordination to another will not excuse him from answering for the consequences of acts or omissions he would otherwise have been bound to. Lord Mansfield (*a*), in *Whitfield v. Lord Le Despeneer*, held that an agent is always liable for his own default. He says: "As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury he is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office loses any of them he is answerable; so is the sorter in the business of his department; so is the postmaster for any fault of his own."

An agent thus runs the risk of being liable to third parties for an act of conversion if the goods he has received from his principal do not belong to that principal. His only course to safeguard himself is to either get an indemnity from his principal or only so to deal with the goods that his act would be justifiable if his principal were merely the finder of the goods.

How agent can safeguard himself against action for conversion.

Conversion has been defined by Mr. Justice Blackburn to be such an interference with the property which would not, as against the true owner, be justified or at least exercised, in one who came lawfully in possession of the goods (*b*). He says, in *Hollins v. Fowler*: "I think it is clear law that if there has been what amounts in law to a conversion of the plaintiff's goods by anyone, however

What is conversion.

(*a*) (1778), Cowp. 754, at p. 765.

(*b*) *Hollins v. Fowler* (1874), 7 H. L. 764.

innocent, that person must pay the value of the goods to the real owner. . . . On principle, one who deals with goods at the request of the person who has actual custody of them, in the *bonâ fide* belief that the custodian is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of a person in possession, if he were a finder of the goods, or intrusted with their custody." The agent will only be liable for the negligence of a third party in the performance of a contract, if he has bound himself by the contract.

Lord Chelmsford's view of what amounts to conversion.

An agent, therefore, is liable in an action for conversion of goods, on the principle "that any person who, however innocently, obtains possession of goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion" (*c*); unless his act is either one which he would be justified in performing if the person who gave him possession, or he himself, were a mere finder—the case dealt with by Lord Blackburn—or the act is one by which the agent exercised and intended to exercise no dominion over the goods, and only was a mere intermediate or conduit pipe between the person who had fraudulently deprived the real owner and the seller: the latter class of case being the one referred to by Lord Cairns in his judgment.

The act of packing being one which an agent might do clearly for a finder (*d*), a packer was held not thereby to be liable for conversion. The distinction, then, between the exercising a dominion over the goods and merely acting as intermediate, is illustrated clearly by two recent cases. In the one, an auctioneer who sold the goods in the ordinary course of his business was held liable, though he did so innocently, for conversion, the act being an

(*c*) *Per* Lord Chelmsford, *Hollins v. Fowler*, *ubi supra*.

(*d*) *Greenway v. Fisher* (1824), 1 C. & P. 190.

exercise of dominion (*e*), in the other (*f*), a cattle dealer was held not liable, as he had only allowed the person who was fraudulently selling a cow to put it into his pen, and had afterwards only taken an offer for it, but had not himself sold the animal. The seller afterwards accepted the offer, and the cow was transferred to the buyer, without the cattle dealer doing more than allow the money to be paid into his account.

The test appears to be whether there is an intention to interfere in any manner with the title or ownership of the chattel, *not merely the possession* of it; and therefore auctioneers who sold furniture by the direction of the giver of a bill of sale were held liable for conversion, although they sold at a private house and without notice of a bill of sale, since the sale was their act and interfered with the ownership (*g*).

Test suggested by
Mr. Justice
Henn Collins.

An agent is, of course, liable for fraud personally, although he may have committed it as agent, and for the benefit of his principal. Lord Westbury says (*h*): "All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or servant of another; and the reason is plain, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud." He then considers whether agents are liable only when they have committed the fraud themselves, or also when they have joined in it, and continues thus: "Another question of law remains, namely, whether the remedy for false and fraudulent representations made to the public is limited to the persons who have avowedly made those representations, or whether persons who have joined in preparing and

Agent liable
for fraud.

(*e*) *Turner v. Hockey* (1879), 40 L. T. 744.

(*f*) *Cockrane v. Ryndill* (1887), 56 L. J. 301.

(*g*) *Consolidated Co. v. Curtis & Son*, (1892) 1 Q. B. 495; *Barker v. Furlong*, (1891) 2 Ch. 172, at p. 183.

(*h*) *Cullen v. Thompson* (1862), 4 MacQueen H. of L. 424, at p. 433.

manufacturing such false representations are liable to the parties injured, although their names did not appear and were unknown to the parties. Upon principle I think it right that in cases of fraud the remedy should be co-extensive with the injury, and that a right of action should be given to the party injured by the fraud against all persons who joined in committing it, although the concurrence of some of these persons might be unknown to the injured party at the time of the injury."

Whether
third party
should sue
agent or
principal.

In considering whom the third party proposes to sue, whether the principal or the agent, he must remember that a judgment against the agent, even if fruitless is, until it is set aside (*i*), an answer in action against the principal, for the principle *nemo debet bis vexari* applies not only to the case of an individual being sued twice for the same cause of action, but also to the case of two actions being brought on the same contract (*k*).

(*i*) *Partington v. Hawthorne* 19 Q. B. D. 229; 56 L. J. 639; (1888), 52 J. P. 807.
(*k*) *Cambefort v. Chapman* (1887), *Kendal v. Hamilton* (1869), 4 Ap. Cas. 504.

CHAPTER XVII.

LIABILITY OF THE THIRD PARTY TO THE AGENT.

As we have seen, where an agent makes a contract as agent for a known principal, he is not liable on the contract to third parties. Being a mere negotiator between the parties, he can neither sue nor be sued; for he is not a party to the contract. The Court of Exchequer therefore nonsuited a broker who sued the third party for non-acceptance in a contract made by bought and sold notes signed by himself, on the ground that he was not a party to the contract. Chief Baron Kelly said he (the broker) may no doubt frame a contract in such a way as to make himself a party to it and entitled to sue; but when he contracts in the ordinary form, describing and signing himself as a broker and naming his principal, no action is maintainable by him (a).

Where agent only negotiates contract the principal known cannot sue third party.

If the agent, however, has an interest in the contract, as where his principal is under advances to him, he can sue (*Fairlie v. Fenton*) (b). In that case a woodbroker, who had made advances to his principal, sold, as agent, a cargo of wood to the defendant on behalf of his principal, and sued the defendant for the price. The defendant pleaded that the cargo belonged to the principal, and a set-off. It was proved that the agent in delivering the cargo asked the defendant if the principal owed the defendant anything, and he said not. Chief Justice Eyre held that under the circumstances, although the sold note showed it

Agent can sue if lien on subject-matter of contract;

(a) (1870), L. R. 5 Ex. 169.

(b) *Atkins v. Amber* (1796), 2 Esp. 492.

was a sale for the principal, the broker had a right to sue, as he had a special property in the timber. So it was also held that an auctioneer whose charges had not been paid could sue, though his principal was known, because he has a lien on the goods for his charges (*c*).

An agent for a consignee of goods who has made advances for freight and insurance in respect of them on behalf of his principal, cannot sue the consignor for damage done to them at sea until he has had possession of them, for he has no lien or interest in them until he has had possession (*d*).

but he can
sue on con-
tract where
principal
undisclosed;

If the agent contracts in his own name he can sue; for it is a well established rule of law, that where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it, the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been a contracting party (*e*).

Evidence is admissible to show that an agent is not really an agent, but the principal; so as on one hand to allow the third party to sue the agent or principal (*f*), or the agent to sue the third party as principal (*g*). In *Schmaltz v. Avery*, the agent had contracted as if for undisclosed principals, and then sued as principal. The Court in holding he could do so, said, "If the contract had been wholly unperformed, and one which the plaintiff by merely proving himself to be real principal was seeking to enforce, the question might admit of some doubt. In many such cases, such as for instance the case of contracts in which the skill or solvency of the person *who is named as principal* may reasonably be considered as a material ingredient in the

(<i>c</i>) <i>Williams v. Millington</i> (1788),	Ad. 389.
1 H. Bl. 81.	(<i>f</i>) <i>Carr v. Jackson</i> (1852), 7 Ex.
(<i>d</i>) <i>Sargent v. Morris</i> (1820), 3	382.
B. & Ald. 277.	(<i>g</i>) <i>Schmaltz v. Avery</i> (1851), 16
(<i>e</i>) <i>Sims v. Bond</i> (1833), 5 B. &	Q. B. 655.

contract, it is clear that the agent cannot then show himself to be the real principal and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts if wholly unperformed or if partly performed without the knowledge of who is the real principal, may be the general rule; but it is plain that it is applicable only to cases where the supposed principal is *named* in the contract. If he be not, it is impossible that the other party can have been in any way induced to enter into the contract by any of the reasons suggested.

But this is subject to the limitations that the agent cannot sue his own principal on the contract that he has made for him, as he is not allowed to change his character; for it is an axiom of the law of principal and agent, that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller without distinct notice to the principal, so that the latter can object if he think proper: a different rule would give the broker an interest against his duty (*h*).

but agent cannot sue his own principal.

Although, as has been already pointed out, the agent can neither sue nor be sued if he contracts as agent for a known principal, yet, if the third party knows the agent is the real principal and accepts part delivery from him as such, he cannot turn round and say the agent is not a party to the contract (*i*). Baron Alderson, in giving judgment in an action brought by an agent under such circumstances, said, "At the time when this contract was made the plaintiff was himself the real principal in the transaction, and although the contract, on the face of it, appeared to have been made by him as agent for another party, there was evidence at the trial tending strongly to show that when the first parcel of the goods was delivered to and accepted by the defendants, the name of the plaintiff as the prin-

Agent can sue, though principal named, if third party knew agent was the real principal.

(*h*) *Robinson v. Mollett* (1874), L. R. 7 H. of L. 802; see also *Sharman v. Brandt* (1871), L. R. 6

Q. B. 720.

(*i*) *Rayner v. Grote* (1846), 15 M. & W. 359.

cipal was then fully known to the defendants. . . . This contract has been in part performed, and that part performance accepted by the defendants, with full knowledge that the principal was not agent but the real principal. If so, we think the plaintiff may, after that, very properly say that they cannot refuse to complete that contract by receiving the remainder of the goods and paying the stipulated price for them. If the contract the agent sought to have enforced were wholly executory, he would probably be nonsuited (*k*). If the contract represents a party to be agent for a named principal, evidence is not in general admissible to show that he is the real principal in order to entitle him to sue as such in contradiction of the written contract (*l*).

An insurance broker may sue though principal named.

Insurance brokers can both sue and be sued by third parties; and an insurance broker who insures for another may sue in his own name (*m*).

In *Sunderland Marine Insurance Co. v. Kearney* (*n*), Mr. Justice Erle cited the following passage from Arnould on Marine Insurance with approval: "As, generally speaking, policies in this country are effected by brokers in their own name for the benefit either of a named principal or of whom it may concern, the general rule is that the action on the policy so effected may be brought either in the name of the principal for whose benefit it was really made, or of the broker who was immediately concerned in effecting it; it is treated in fact as the contract of the principal as well as of the agent."

Action on deed poll.

The insurance which was the subject-matter of the litigation in *Sunderland Marine Insurance Co. v. Kearney*, was effected by a deed poll, in which the insurance company, whose deed it was, only recited that one of the plaintiffs was interested. It was, therefore, argued

(*k*) *Rayner v. Grote*, *ubi supra*.

(*l*) *Humble v. Hunter* (1848), 12 Q. B. 310; *Redpath v. Wigg* (1866), L. R. 1 Ex. 335.

(*m*) *Provincial Insurance Co. of Canada v. Leduc* (1874), 6 P. C. 224.

(*n*) (1851), 16 Q. B. 925.

that the other plaintiff had no right to sue. Lord Campbell, who delivered judgment, said, that there was no reported decision on the point, for the objection had never been taken before. "The treatises upon marine insurance laid down that the action upon a policy effected by a broker might either be brought in the name of the broker immediately concerned in effecting the policy, or in the names of the parties interested for whose benefit it was effected, and did not state any exceptions as to policies in the form of a deed poll under the seal of an incorporated company, although a very considerable portion of English policies for more than a century have been by deed poll under the seal of the Royal Exchange Assurance Company or of the Crown Assurance Company. Upon such policies effected by brokers, many actions have been brought in the names of the parties interested without any objection being made or thought of respecting the rights of the parties interested to sue. . . . The plaintiffs were, at the time of the loss, . . . jointly interested in the freight . . . to the amount of the money by them insured or caused to be insured thereupon. The plaintiffs, therefore, show that the Sunderland Insurance Company covenanted to pay them the 300*l.* in the event that has happened, and, therefore, that they are entitled jointly to bring this action though the name of one of them only is mentioned as having effected the policy."

If the agent is suing on behalf of his principal on a contract made for him, it is no answer to an action which he brings to allege he is an agent unless it can be shown that he is prohibited bringing the action by the principal on whose behalf the contract was made (o).

No defence to
allege that
plaintiff an
agent.

When the principal has agreed to consider the third party as his debtor, and has taken steps to recover the debt from him, the right of the agent to sue ceases. After the

If principal
sues third
party, agent
cannot sue.

(o) *Per* Bayley, J., in *Sargent v. Morris* (1820), 3 B. & Ald. 277 at p. 288.

intervention of the principal, the right of the factor to sue is gone (*p*).

Unless principal under advances, in which case he cannot intervene.

But if the factor or agent has advanced money to the principal on the security of goods, the principal cannot intervene and get payment to himself, but the agent has a right to sue; for, as Lord Mansfield put it, there is no case in law or equity where a factor having money due to him (from the principal) to the amount of the debt in dispute, was ever prevented from taking the proceeds of the sale into his hands (*q*).

Or agent *del credere* agent.

If the agent is a *del credere* agent, it seems open to doubt whether the principal can, by intervening, stop the agent's right to sue. If he does so, it might be evidence that the agent would no longer be held to his *del credere* commission guaranteeing the solvency of the third party (*r*).

Whether agent of foreign principal can sue on contract where he signed "as agent."

It is well established that unless it is shown that the foreign principal authorized the agent to establish privity of contract between him and the third party, that the foreign principal is not liable on the contract made by the agent (*s*). There was, therefore, stated to be a presumption that the agent was liable. It has been held, however, in the more modern cases that there is no presumption either way as to the agent's liability, although the fact that his principal is abroad will be a circumstance of weight. Contracting, however, "as agent" he will not be liable on the contract. In such a case it would appear, therefore, he cannot sue either.

Agent can sue for money paid by mistake.

The agent also acquires a right to sue a third party if he has paid him money by mistake for his principal: *Qui facit per alium, facit per se*. Where a man pays money by an agent which ought not to have been paid, either the agent or principal may bring an action to recover it back; the agent may,

(*p*) *Per* Lord Ellenborough in *Sadler v. Leigh* (1815), 4 Camp. 194, at p. 195.

(*q*) *Drinkwater v. Goodwin* (1775), Cowper, 251; *Atkyns v. Amber*

(1796), 2 Esp. 492.

(*r*) *Sadler v. Leigh*, *ubi supra*.

(*s*) *Hutton v. Bullock* (1873), L. R. 9 Q. B. 572.

from the authority of the principal, and the principal may as proving it to have been paid by his agent (*t*).

The agent is also entitled to sue to recover money paid under an illegal contract if he did not know of its illegality at the time. Thus, where an agent insured the goods of an alien enemy, without knowing of the breaking out of hostilities, he was held entitled to a return of the premium (*u*).

Agent entitled to recover money paid under illegal contract if ignorant of illegality.

Any surreptitious dealing between one principal and the agent of the other principal is a fraud on such principal, and if the agent makes a contract by which he is to receive a commission from the third party for superintending the work done by the third party for the principal, it is a corrupt contract on which he cannot sue; for the tendency of such an agreement must be to bias the mind of the agent or other person employed, so as to lead him to act disloyally to his principal (*x*).

Agent cannot sue on corrupt contract with agent of third party.

In the same way, if the agent's time is, by agreement with his principal, all his principal's, he cannot sue for work done (*y*).

Cannot sue for remuneration if time his principal's.

If the agent sues the third party, any defence may be set up against the agent that may be available as against him personally, and it will be an answer to the action. Therefore, it was held that where an insurance broker sued for money due on a loss, a plea that the defendants had paid him by crediting him with the amount of the loss as against premiums due by him to them was a good plea (*z*).

When agent sues, a defence available against himself personally is good.

On the other hand, it must be remembered, if the agent has a lien on goods the subject-matter of the action, a defence which would be good against the principal is no

Defence good against principal not good against agent if lien.

(*t*) *Stevenson v. Mortimer* (1778), Cowper, 805.

(*u*) *Oom v. Bruce* (1810), 12 East, 224.

(*x*) *Harrington v. Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549; *Panama and South Pacific Tel.*

Co. v. The India Rubber Works Co. (1875), 10 Ch. Ap. 515.

(*y*) *Thompson v. Havelock* (1808), 1 Camp. 527.

(*z*) *Gibson v. Winter* (1833), 5 B. & Ad. 96.

answer (a) when he is suing for his own benefit. If the agent sues merely as trustee on behalf of his principal, it is a good defence (b).

Agent can
bring action
for trover.

Any agent who has a right to the possession of goods may bring an action of trover for their conversion (c). So an agent may sue for the conversion of his principal's property, if he is in possession of it. Lord Campbell said: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was a title in some third person against a wrongdoer" (d).

What kind of
agent may
bring trover.

A factor to whom goods have been consigned, and who has never received them, may bring trover for them (e); and even a person to whom property has been lent has a right to bring an action for damage done to it (f). In *Anderson v. Clark* it was held that appropriating goods to the factor, and putting them in the hands of a third person on his account, is sufficient to enable the person to whom they are appropriated to maintain trover (g), but unless there was an advance on the particular goods, the right of the factor to the goods would not override the unpaid vendor's right of stoppage *in transitu* (h).

(a) *Robinson v. Rutter* (1855), 4 E. & B. 954.

(b) *Grice v. Kenrick* (1870), L. R. 5 Q. B. 340.

(c) *Per* Baron Parke in *Legg v. Evans* (1840), 6 M. & W. at p. 41.

(d) *Jeffries v. Great Western Rail. Co.* (1856), 5 E. & B. 802.

(e) *Per* Eyre, C. J., in *Fowler v. Down* (1797), 1 B. & P. 44, at p. 47.

(f) *Rooth v. Wilson* (1817), 1 B. & Ald. 59.

(g) (1824), 2 Bing. 20; see also *Bryant v. Nix* (1839), 4 M. & W. 775.

(h) *Patten v. Thompson* (1816), 5 M. & S. 350.

CHAPTER XVIII.

PUBLIC AGENTS.

AGENTS who act on behalf of the public, or on behalf of the Government, are public agents (*a*). An action will not lie against a public agent for anything done by him in his public character or employment, although the act may be alleged to be a breach of such employment and constituting a particular and personal liability (*b*); nor can he bring any action on such a contract (*c*). This is so on principles of public policy, for the liability to an unlimited multiplicity of suits would prevent any prudent person accepting a public situation at the hazard of such peril. In any case where a man acts as agent for the Government, and treats in that capacity, there is no pretence of saying he is personally liable, unless he himself contracts to be so liable.

No action
against public
agent on con-
tract.

The remedy of a person who has contracted with a public officer of the Crown is by petition of right (*d*).

Remedy by
petition of
right.

If a public agent goes out of his way to give orders which it is not part of his duty to give, and he gives such orders on his own responsibility, without having authority to contract upon the credit of any person or fund, he will, however, be personally liable (*e*).

Liable on
contracts
outside his
public duty.

It does not seem clear whether a public agent, if he has received money for the purpose of paying a third party, can

Whether
public agent
can be sued

(*a*) Story on Agency, § 302.

(*b*) *Gidley v. Palmerston* (1822), 3 Brod. & Bing. 275; *Macbeath v. Haldimand* (1786), 1 T. R. 172; *Unwin v. Wolseley* (1787), 1 T. R. 674.

(*c*) *Bowen v. Morris* (1810), 2 Taunt. 373.

(*d*) *Thomas v. The Queen* (1874), L. R. 10 Q. B. 31.

(*e*) *Auty v. Hutchinson* (1848), 17 L. J. C. P. 304.

for money had
and received.

be sued by such a person for money had to his use. In one case (*f*), where a yeomanry captain was sued for forage supplied to the use of his troop, Lord Kenyon said: "I cannot conceive how the captain of a troop can be personally responsible for forage furnished to the troop, whether he have received money for that purpose or not. . . . It is notorious to all parties that he does not contract as an individual, but on behalf of the Government." In *Rice v. Everett*, which will be found in the notes to *Rice v. Chute*, the Court, however, refused to set aside a verdict against the colonel of the same regiment, as he happened to be indebted to the paymaster of the regiment, who had absconded with the money intended to be devoted to the expenses of the regiment, and was also the surety of the paymaster to the Government.

Public agents
liable for
negligence.

The Government are not liable for the negligence or torts of their employee, but the employees are liable themselves for their own negligence (*g*). If public agents performing a duty under an Act of Parliament act according to the best of their skill and diligence they are not liable for any damage that may ensue (*h*); but if they do not exercise proper skill (*i*), or if they exceed their authority, they are liable (*k*).

In *Hall v. Smith* (*l*) an action was brought against the clerk of certain lighting commissioners by a person who was injured by falling into an unlit ditch. The commissioners had employed a firm of contractors to excavate the ground, and it was through the negligence of the contractors' servant that there was no light. The contractors were held liable for their servant's negligence; but it was

(*f*) *Rice v. Chute* (1801), 1 East, 578.

(*g*) Story on Agency, § 318; *Lane v. Cotton* (1701), 1 Ld. Raym. 616, p. 618; *Whitfield v. Despencer* (1778), Cowper, 754.

(*h*) *Boulton v. Crouther* (1824), 2 B. & C. 703.

(*i*) *Jones v. Bird* (1822), 5 B. & Ald. 837.

(*k*) *Leader v. Moxon* (1774), 2 W. Bl. 924.

(*l*) (1824), 2 Bing. 156; see also *Duncan v. Findlater* (1839), 6 Cl. & Fin. 894; and *Ward v. Lee* (1857), 7 El. & Bl. 426.

attempted to make the commissioners personally liable also. Chief Justice Best, in giving judgment, said: "If commissioners under an Act of Parliament order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action; but they are not answerable for the misconduct of such as they are obliged to employ. If the doctrine of *respondent superior* were applied to such commissioners, who would be hardy enough to undertake any of those various offices by which much valuable, yet unpaid, service is rendered to the country? . . . Such commissioners will act no longer if they are to make amends from their own fortunes for the conduct of such as must be employed under them. . . . The maxim of *respondent superior* is bottomed on this principle—that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." If the commissioners therefore do not exceed their jurisdiction, and the Act under which they are constituted gives no remedy, the party is remediless (*m*).

Principle
*respondent
superior* does
not apply to
public agents.

The captain of a ship of war, and it seems also the captain of any ship, who does not appoint his own officers, is not liable for their negligence (*n*). In a case where the plaintiff attempted to make the captain of a warship liable for a collision which occurred when he was not on deck or managing the ship, but the first lieutenant, Lord Ellenborough said: "Captain Mouncey is said to be liable for the damages awarded in this case by considering him in the ordinary character of the master of the vessel by means of which the injury was done to the plaintiff's property. But how was he master? He had no power of appointing the officers

Liability of
captain of
man-of-war.

(*m*) *Governors of Cast Plate Manu-
facturers v. Meredith* (1792), 4 T. R.
794.

(*n*) *Nicholson v. Mouncey* (1812),
15 East, 384.

or crew on board; he was no volunteer in that particular station merely by having originally entered into the naval service, but was compellable to take it when appointed to it, and had no choice whether or not he would serve with other persons on board, but was obliged to take such as he found there and make the best of them. He had no power of appointment or dismissal over them. The case is, therefore, not at all like that of an owner or master who, according to the principle laid down by Lord Chief Justice Eyre in *Bush v. Steinman* (o), is answerable for those whom he employs for injuries done by them to others within the scope of their employment.

Not liable for
tort if ratified
by govern-
ment.

An agent of the Crown appears, in no case, to be liable for a tort if the act has been subsequently ratified by the Crown.

Baron Parke, in *Buron v. Denman* (p), says, "If the Crown ratifies an act, the character of the act becomes altered; for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liabilities the person who commits the trespass."

(o) (1799), 1 Bos. & Pul. 404.

(p) (1848), 2 Ex. 167, at p. 189.

APPENDIX.

FACTORS ACT, 1889.

52 & 53 VICT. c. 45.

An Act to amend and consolidate the Factors Acts.

[26th August 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

1. For the purposes of this Act—

Definitions.

- (1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods :
- (2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf :
- (3.) The expression "goods" shall include wares and merchandise :
- (4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by

delivery, the possessor of the document to transfer or receive goods thereby represented :

- (5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability :
- (6.) The expression "person" shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

Powers of mercantile agent with respect to disposition of goods.

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of pledges of documents of title.

Pledge for antecedent debt.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Rights
acquired by
exchange of
goods or
documents.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Agreements
through
clerks, &c.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

Provisions as
to consignors
and con-
signees.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Disposition
by seller
remaining in
possession.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other

Disposition
by buyer
obtaining
possession.

disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Effect of transfer of documents on vendor's lien or right of stoppage *in transitu*.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

Supplemental.

Mode of transferring documents.

11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Saving for rights of true owner.

12.—(1.) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

Saving for common law

13. The provisions of this Act shall be construed in ampli-

fication and not in derogation of the powers exercisable by an agent independently of this Act. powers of agent.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed. Repeal.

15. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety. Commence-ment.

16. This Act shall not extend to Scotland.

Extent of Act.

17. This Act may be cited as the Factors Act, 1889.

Short title.

SCHEDULE.

ENACTMENTS REPEALED.

Section 14.

Session and Chapter.	Title.	Extent of Repeal.
4 Geo. 4, c. 83 ..	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandises entrusted to factors or agents.	The whole Act.
6 Geo. 4, c. 94 ..	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39..	An Act to amend the law relating to advances bonâ fide made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c. 39	An Act to amend the Factors Acts.	The whole Act.

GAMING ACT, 1892.

55 VICT. c. 9.

An Act to amend the Act of the eighth and ninth Victoria, chapter one hundred and nine, intituled "An Act to amend the Law concerning Games and Wagers."

[20th May 1892.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Promises to
repay sums
paid under
contracts
void by
8 & 9 Vict.
c. 109, to be
null and void.

1. Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

Short title.

2. This Act may be cited as the Gaming Act, 1892.

MARRIED WOMEN'S PROPERTY ACT, 1893.

56 & 57 VICT. c. 63.

An Act to amend the Married Women's Property Act, 1882.
[5th December 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Effect of
contracts by
married
women.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just. Costs may be ordered to be paid out of property subject to restraint on anticipation.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband. Will of married woman.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed. Repeal.

5. This Act may be cited as the Married Women's Property Act, 1893. Short title.

6. This Act shall not apply to Scotland. Extent.

SALE OF GOODS ACT, 1893.

56 & 57 VICT. c. 71.

An Act for codifying the Law relating to the Sale of Goods.
[20th February 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PART I.—FORMATION OF THE CONTRACT.

Contract of Sale.

Sale and
agreement to
sell.

1.—(1.) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2.) A contract of sale may be absolute or conditional.

(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Capacity to
buy and sell.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Contract of sale, how made.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

Contract of sale for ten pounds and upwards.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.

Subject-matter of Contract.

5.—(1.) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

Existing or future goods.

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have

Goods which have perished.

perished at the time when the contract is made, the contract is void.

Goods
perishing
before sale
but after
agreement to
sell.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

Ascertain-
ment of price.

8.—(1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Agreement to
sell at valua-
tion.

9.—(1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

Stipulations
as to time.

10.—(1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2.) In a contract of sale “month” means *prima facie* calendar month.

When con-
dition to be
treated as
warranty.

11.—(1.) In England or Ireland—

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right

to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract :

- (e) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is— Implied undertaking as to title, &c.

- (1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass :
- (2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods :
- (3.) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made :

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. Sale by description.

Implied conditions as to quality or fitness.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

- (1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose :
- (2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :
- (3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade :
- (4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample.

Sale by sample.

15.—(1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

- (2.) In the case of a contract for sale by sample—
 - (a.) There is an implied condition that the bulk shall correspond with the sample in quality :
 - (b.) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample :
 - (c.) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.—EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. Goods must be ascertained.

17.—(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Property passes when intended to pass.

(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Rules for ascertaining intention.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms the property therein passes to the buyer :—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction :

(b.) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on

the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made :

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Reservation
of right of
disposal.

19.—(1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Risk *primâ
facie* passes
with pro-
perty.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Transfer of Title.

21.—(1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Sale by person not the owner.

(2.) Provided also that nothing in this Act shall affect—

(a.) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b.) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a Court of competent jurisdiction.

22.—(1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

Market overt.

(2.) Nothing in this section shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Sale under voidable title

24.—(1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

Revesting of property in stolen goods on conviction of offender.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3.) The provisions of this section do not apply to Scotland.

Seller or
buyer in
possession
after sale.

25.—(1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

Effect of
writs of
execution.

26.—(1.) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to indorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

PART III.—PERFORMANCE OF THE CONTRACT.

Duties of
seller and
buyer.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods. Payment and delivery are concurrent conditions.

29.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery. Rules as to delivery.

(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30.—(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate. Delivery of wrong quantity.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods

which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Instalment
deliveries.

31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

Delivery to
carrier.

32.—(1.) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Risk where
goods are
delivered at
distant place.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Buyer's right
of examining
the goods.

34.—(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable op-

portunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. Acceptance.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them. Buyer not bound to return rejected goods.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract. Liability of buyer for neglecting or refusing delivery of goods.

PART IV.—RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38.—(1.) The seller of goods is deemed to be an “unpaid seller” within the meaning of this Act— Unpaid seller defined.

- (a) When the whole of the price has not been paid or tendered;
- (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2.) In this part of this Act the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Unpaid
seller's rights.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a.) A lien on the goods or right to retain them for the price while he is in possession of them;
- (b.) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;
- (c.) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

Attachment
by seller in
Scotland.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien.

Seller's lien.

41.—(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

- (a.) Where the goods have been sold without any stipulation as to credit;
- (b.) Where the goods have been sold on credit, but the term of credit has expired;
- (c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

Part delivery.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Termination
of lien.

43.—(1.) The unpaid seller of goods loses his lien or right of retention thereon—

- (a.) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the

buyer without reserving the right of disposal of the goods ;

(b.) When the buyer or his agent lawfully obtains possession of the goods ;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Right of
stoppage in
transitu.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

Duration of
transit.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the

buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage
in transitu is
effected.

46.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller.

Effect of sub-
sale or pledge
by buyer.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

Sale not
generally
rescinded by
lien or stop-
page in
transitu.

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay

or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.—ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49.—(1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods. Action for price.

(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. Damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51.—(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. Damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Specific performance.

52. In any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

Remedy for breach of warranty.

53.—(1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

Interest and

54. Nothing in this Act shall affect the right of the buyer

or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. special damages.

PART VI.—SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. Exclusion of implied terms and conditions.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact. Reasonable time a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action. Rights, &c. enforceable by action.

58. In the case of a sale by auction—

- (1.) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale:
- (2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:
- (3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer.
- (4.) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the dis- Payment into Court in Scotland when breach

of warranty
alleged.

creation of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

Repeal.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

Savings.

61.—(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

Interpreta-
tion of
terms.

62.—(1.) In this Act, unless the context or subject-matter otherwise requires,—

“Action” includes counter-claim and set-off, and in Scotland condescendence and claim and compensation :

“Bailee” in Scotland includes custodier :

“Buyer” means a person who buys or agrees to buy goods :

“Contract of sale” includes an agreement to sell as well as a sale :

“Defendant” includes in Scotland defender, respondent, and claimant in a multiplepounding :

“Delivery” means voluntary transfer of possession from one person to another :

“Document of title to goods” has the same meaning as it has in the Factors Acts :

“Factors Acts” mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same : 52 & 53 Vict.
c. 45.
53 & 54 Vict.
c. 40.

“Fault” means wrongful act or default :

“Future goods” mean goods to be manufactured or acquired by the seller after the making of the contract of sale :

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale :

“Lien” in Scotland includes right of retention :

“Plaintiff” includes pursuer, complainer, claimant in a multiplepoinding and defendant or defender counter-claiming :

“Property” means the general property in goods, and not merely a special property :

“Quality of goods” includes their state or condition :

“Sale” includes a bargain and sale as well as a sale and delivery :

“Seller” means a person who sells or agrees to sell goods :

“Specific goods” mean goods identified and agreed upon at the time a contract of sale is made :

“Warranty” as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2.) A thing is deemed to be done “in good faith” within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4.) Goods are in a “deliverable state” within the mean-

ing of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Commence-
ment. 63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

Short title. 64. This Act may be cited as the Sale of Goods Act, 1893.

Section 60.

SCHEDULE.

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

EXACTMENTS REPEALED.

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. 1, c. 21	An Act against brokers. The whole Act.
29 Cha. 2, c. 3	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen.*
9 Geo. 4, c. 14	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven.
19 & 20 Vict. c. 60 ..	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97 ..	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two.

* Commonly cited as sections sixteen and seventeen.

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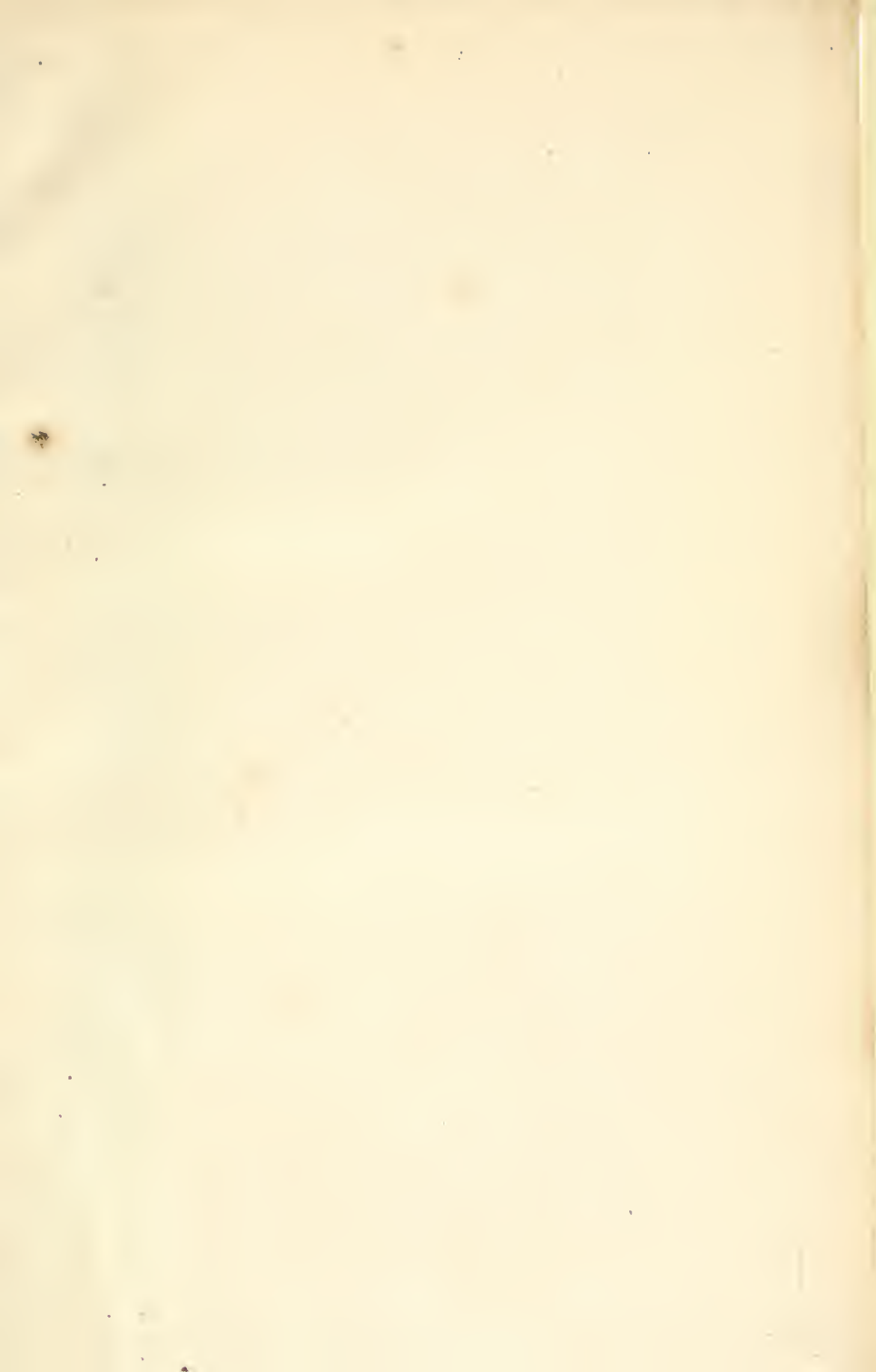
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